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THE OHIO NISI PRIUS REPORTS

NEW SERIES. VOLUME XXII.

BEING REPORTS OF CASES DECIDED
BY THE
SUPERIOR, COMMON PLEAS, PROBATE AND
INSOLVENCY COURTS OF THE
STATE OF OHIO.

VINTON R. SHEPARD, EDITOR.

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THE OHIO LAW REPORTER COMPANY.
1920.

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PFC 4. 1920

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Ohio Nisi Prius Reports

NEW SERIES—VOLUME XXII.

Causes Argued and Determined in the Superior, Common Pleas,
Probate and Insolvency Courts of Ohio.

INTERFERENCE WITH CIVIL RIGHTS BY A RELIGIOUS BAN.

Common Pleas Court of Holmes County.

(Judge E. B. Kinkead of Franklin County, sitting by designation of the
Chief Justice.)

ELI J. GINERICH V. JONAS SWARTZENTRUBER AND SIX OTHERS.

Decided, May, 1919.

*Unlawful "Miting" of a Church Member—Relief Available by Injunction
when Civil Rights are being Interfered with—Boycott not Permis-
sible as a Weapon for Enforcing Church Discipline—Religious Prac-
tices which Violate Civil Rights.*

1. A church or religious organization is not at liberty, in furtherance of some peculiar belief or Biblical interpretation, to enforce a decree which interferes with civil rights; and where such an organization issues an order that one who has ceased to uphold its practices and has withdrawn from its communion shall be "mited," shunned or boycotted by the entire membership to the extent of refusing to trade with him, to employ him or be employed by him, or to eat with him or associate with him in any way, and this order is made to include members of his own family, injunction lies not only against enforcement of the order but by mandate directing that the

said order be revoked and the membership of said churches instructed that it is no longer their duty or privilege to observe or carry out said boycott.

2. The action of a body of bishops and preachers of a sect, imposing penalties upon a member of one of the churches of that sect for failure to believe and observe a certain doctrine of the sect under pain or penalty of dismissal, is violative of the personal right of religious liberty.
3. No religious view can justify infringement of a civil right; and where passages from the Bible are interpreted in a manner so crude and unnatural as to interfere with the family relation and prevent intercourse between parents and children, husband and wife or other relatives, and tend to destroy natural affection toward the one so placed under the ban, a situation is created of so serious a character as to clearly justify judicial action.

Chas. R. Cary and Judge Frank Taggart, for plaintiff.

Judge Wm. E. Weygandt and George Sharp, contra.

KINKEAD, J. (sitting by designation of the Chief Justice.)

This action is probably the first of its kind.

It is brought by plaintiff, who was formerly a member of the David Miller Old Order Amish Mennonite Church, against seven preachers and bishops of the several churches located in eastern Holmes county. The Amishites constitute about one-third of the population of Holmes county; they have so improved that part of the county that it is a beautiful and most valuable and fertile part thereof. Their houses are substantially built alike, provision being made in all of them for a room large enough to accommodate church congregations of from a hundred and fifty to two hundred. Their church meetings are held in the houses in the winter, and in their commodious barns in the summer. Their churches are usually named after individuals, plaintiff herein having once been a member of David Miller church. Their name is derived from Jacob Amen, a native of Switzerland in the 17th century, who was a preacher of the Mennonite denomination. Amen opposed abuses of the church erected by the sainted Menno Simon, the founder of the sect that still bears his name. Menno was a contemporary of

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Luther. The Bible of Martin Luther, printed in the old German text, probably constitutes the library of each household.

These people are still intensely devoted to the Confession of Faith, known as the Confession of Dortrecht, signed in the city of Dort, Holland, by the leading disciples of Menno Simon in the year 1622. They are religiously opposed to war which was the cause of their leaving their native land. They settled in what is now Holmes county in 1811, fourteen years before the county was organized.

Their language is low German, the use of which they earnestly insist upon; it was with much difficulty that some of the witnesses were compelled to use English on the stand, even those who could speak it well. They were fearful that they might not properly express themselves in English, and that they might not be understood.

The complaint in this case is made against the defendant preachers and bishops for enforcing a rule of the church called "miting" or "meiden," which is boycotting under our civil law. This as practiced under their Confession of Faith is based upon its provisions and their religious belief.

Several complaints were made against plaintiff; he was rather an obstreperous member according to old Amish conceptions. It is an ironclad rule that the orders and decrees of the preachers and bishops must be obeyed.

The evidence shows that Ginerich had a mind of his own, and that he was altogether too independent to suit the clans. He did not believe in the doctrine of "miting" or "meiden" or boycotting; he thought it wrong, and he clearly manifested his adverse attitude to this doctrine of the church.

He also broke over the rule of the sect concerning dress. "We have our rules, and they must be obeyed," said one of the defendants in his testimony. Such is the attitude of the defendants as disclosed by the evidence. However, their position is one of sincerity and devotion. These people have lived lives of community recluses; they have not come in contact with the outer world or with the enlightenment and blessings of modern Christian civilization. They live among themselves and still

maintain their own peculiar customs; they do not take advantage of modern and enlightened educational advantages. They are allowed freedom and shelter under our constitutional liberty of conscience and religion, but cling to their mother tongue and their ancient customs. Their customs are such as to prevent their children from becoming educated like other American citizens; their purpose is to keep their children in the path of ancient Amishites. This retardment of education and enlightened civilization is probably due to the great liberality of our constitutional liberty and freedom, and our laxity in enforcing education according to American ideals.

The petition alleges that plaintiff was a member of one of the old order Amish churches, and that the seven defendants are preachers and bishops thereof. Plaintiff complains that defendants attempted to make a rule that if any member left the church a ban was to be placed on such member forbidding all members to trade with, work for, employ, eat at the same table, live with or in any manner have any business dealings or associate with such member placed under such ban. Plaintiff alleges that such rule failed of adoption; that demand nevertheless was made upon plaintiff to abide by such rule which he refused to do; that on account of his refusal defendants and certain members of their churches refused to deal with, or to sell goods or merchandise to plaintiff, work for or employ him, or to eat at the same table with him, or to mingle socially with him; but boycoted him under threat of expulsion from their churches, as well as to boycott members of the churches who failed also to boycott plaintiff according to the orders of defendants.

On the contrary, plaintiff states that he severed his connection with the Miller church with the knowledge and consent of the defendants and the churches.

The evidence sustains the claim that plaintiff obtained the consent of the former preacher of the Miller church (now deceased) to leave the church. Plaintiff thereupon joined the Martinscreek church, which the evidence shows to be a much more liberal and advanced church, there being greater freedom to depart from the old customs.

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Plaintiff began to wear suspenders, claiming it to be essential to his comfort, but he was called to account by the Old Amish preachers. He did not yield to their demand, so this was one of the complaints made against him.

Plaintiff transferred his membership from the Martinscreek church to a newly organized one, called the Bunker's Hill church. The members of this church may own automobiles and indulge in other modern things without fear of condemnation. Plaintiff claims that the Martinscreek church gave its consent to his withdrawal therefrom, he with others having organized the Bunker's Hill church. But since the organization of this church and plaintiff's membership therein, it is claimed that defendants have unlawfully and maliciously conspired to place and continue plaintiff under the ban of their churches; by reason of such ban plaintiff complains that a portion of the members of their churches, under threat of expulsion and of being placed under the ban and boycott, have unlawfully and maliciously refused to trade with, work for, employ, sell to, eat at the same table with plaintiff, or in any way to mingle socially or in a business manner with plaintiff.

Plaintiff complains that defendants have conspired to induce his wife to place him under the ban, to refuse to minister to, cohabit with, eat at the same family table with him, or to treat him as a dutiful and lawful wife.

He charges also that they have caused his daughter to boycott him and refuse to visit and eat with him, or to mingle with him in a social, family or business way.

The daughter evidently yielded to the orders and directions of defendants. She married since her father was placed under the ban; she could not have her wedding feast in her father's home because neither she nor her husband, nor the wedding guests were permitted to eat at the same table with her father. The daughter has observed the orders of the preachers and bishops. On the witness stand she stated in effect that it was her father's own fault, that he was thus in trouble, meaning his failure to comply with the orders of the preachers and bishops was the cause of his trouble. The father could not at-

tend the wedding on account of the boycott; the daughter does not now go to her father's home and eat with him, nor does the father go to his daughter's home and eat with her. They have a few times visited each other; but now the daughter strictly complies with the church directions.

None of the members of the other churches who are all farmers are permitted under the ban, or boycott, to help plaintiff thresh or do work for him.

Plaintiff alleges that defendants placed his brother Menno Ginerich under the ban and boycotted him because he refused to observe the ban and assisted plaintiff and ate with him.

Plaintiff is engaged in farm work in Berlin township, and is the owner of a farm of 131 acres and complains that by reason of the ban and boycott directed by defendants, his neighbors and friends have not assisted him on his farm as is usual and customary among farmers.

Plaintiff claims that he has been caused much mental and physical strain, worry, disturbance, pain, anguish and distress, and has been damaged in the sum of \$10,000. He asks that defendants be permanently enjoined from continuing the ban or boycott against him, and from inducing others to boycott him or from interfering with him in his business or his social affairs with his neighbors and the members of the Old Order of Amish Mennonite Churches.

The pleading of defendants is a homespun answer, probably the product of defendants themselves. It is not signed by counsel. It sets forth the manner in which their members are taken into their church. It sets forth Article XVI of their Confession of Faith which is as follows:

"We also believe in and acknowledge the ban, or excommunication, a separation or spiritual punishment by the church, for the amendment, and not for the destruction, of offenders; so that what is pure may be separated from that which is impure. That is, if a person, after having been enlightened, and received into the communion of the saints, does willfully or out of presumption, sin against God, or commit some other sin unto death; thereby falling into such unfruitful works of darkness that he

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becomes separated from God, and is debarred from his kingdom—that such an one—when his works become manifest, and sufficiently known to the church—can not remain in the ‘congregation of the righteous;’ but must, as an offensive member and open sinner, be excluded from the church ‘rebuked before all,’ and ‘purged out as a leaven,’ and thus remain until his amendment, as an example and warning to others, and also that the church may be kept pure from such ‘spots’ and ‘blemishes’; so that not for the want of this, the name of the Lord be blasphemed, the church dishonored, and a stumbling-block thrown in the way of those ‘without,’ and finally, that the offender may not be condemned with the world, but that he may again be convinced of the error of his ways, and brought to repentance and amendment of life. Isaiah 50:2; I Cor. 5:5, 6, 12; I Timothy 5:20; II Cor. 13:10.

“Regarding the brotherly admonition, as also the instruction of the erring, we are to ‘give all diligence’ to watch over them, and exhort them in all meekness to the amendment of their ways (James 5:19, 20); and in case any should remain obstinate and unconverted, to reprove them as the case may require. In short, the church must ‘put away from among herself him that is wicked’ whether it be in doctrine or life.”

Article 17, the Shunning of Those Who are Expelled:

“As regards the withdrawing from or the shunning of, those who are expelled, we believe and confess, that if any one, whether it be through a wicked life or perverse doctrine—is so far fallen as to be separated from God, and consequently rebuked by, and expelled from, the church, he must also according to the doctrine of Christ and his Apostles, be shunned and avoided by all the members of the church (particularly by those to whom his misdeeds are known), whether it be in eating or drinking, or other such like social matters. In short, that we are to have nothing to do with him; so that we may not become defiled by intercourse with him, and partake of his sins; but that he may be made ashamed, be affected in his mind, convinced in his conscience and thereby induced to amend his ways. I Cor. 5:9-11; Rom. 16:17; II Thess. 3:14; Titus 3:10.

“That nevertheless, as well in shunning as in reproofing such offender, such moderation and Christian discretion be used, that such shunning and reproof may not be conducive to his ruin, but be serviceable to his amendment. For should he be in need, hungry, thirsty, naked, sick or visited by some other affliction, we are in duty bound, according to the doctrine and practice of Christ and his Apostles, to render him aid and assistance, as

necessity may require; otherwise the shunning of him might be rather condusive to his ruin than to his amendment. I Thess. 5:14.

“Therefore we must not treat such offenders as enemies, but exhort them as brethren, in order thereby to bring them to a knowledge of their sins and to repentance; so that they may again become reconciled to God and the church and be received and admitted into the same—thus exercising love towards them, as is becoming. II Thess. 3:15.”

The references to the Bible consist of exhortations not to keep company with fornicators, or the covetous, or with idolaters, or extortioners, or a railer, or a drunkard, and not to eat with such ones; to avoid those who cause divisions and offenses contrary to doctrines; and to note the man who does not obey, and have no company with him, that he may be ashamed. Yet he must not be counted as an enemy, but is to be admonished as a brother, according to scriptural doctrine.

The answer of defendants states that after “plaintiff had neglected our church, he was placed under the ban.” It is alleged that special investigation was made by a special committee of the church, two bishops and one elder, which committee after full hearing of both sides, those who were not satisfied and those favoring the ban, sustained it.

The matter was submitted to the General Conference which it is alleged after full consideration approved all matters connected with plaintiff and discipline of the church.

Defendants deny the charge that they endeavored to persuade the wife and daughter to boycott plaintiff, although they claimed that it would be right for the wife and daughter to shun a husband or father.

The answer concludes:

“We hereby beg the court for the freedom we and our forefathers have enjoyed heretofore under the government of our country, which we acknowledge as ministers of God.”

The rule of this sect is that the members thereof are not permitted to resort to law for redress of grievances among themselves. Plaintiff has been placed under the ban for bringing this action.

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The question presented for decision appears to be whether the rule of discipline which defendants have adopted, and put into effect against plaintiff, has violated a civil right.

We know that religious liberty is guaranteed by the Constitution; that legislative and judicial power does not extend to individual opinion or religious belief (Constitution Art. I, Section 7), but that it is left free to reach acts violative of social duties and obligations cognizable at law. *Reynolds v. U. S.*, 98 U. S., 145, 164. Nor have the courts power to revise ordinary acts of church discipline or to pass upon controverted rights of membership. *Gewin v. Church*, 166 Ala., 345; 139 Am. St., 41; *Hundley v. Collins*, 131 Ala., 234; 90 Am. St., 33.

Upon questions of discipline arising under articles of faith, the decisions of the church are ordinarily final, and must be respected and enforced by courts, unless they violate the civil law. *Krecker v. Shirey*, 163 Pa. St., 354; 29 L. R. A., 476; *Harrison v. Hoyle*, 24 O. S., 254.

While decisions by the church body require individual voluntary obedience, still they are not effective against civil rights and obligations. *Smith v. Nelson*, 18 Vt., 511.

Questions of church membership are purely ecclesiastical when no civil right is involved. *Waller v. Howell*, 45 N. Y. Supp., 790. Excommunication in exercise of the power of church discipline is valid when no civil right is violated. *Nance v. Busby*, 91 Tenn., 303, 15 L. R. A., 801; *Jennings v. Scarborough*, 56 N. J. L., 401.

Judicial interference is therefore warranted only when civil rights are involved and infringed by church action, or members of the church. The civil tribunal tries the civil right and nothing more. 100 Am. St., 714, Note.

Judicial tribunals may assume jurisdiction of church difficulties only when some church action and practice clearly infringes upon some civil right. The doctrines and rules of boycotting ordinarily can not have application to acts of a church or of its officers and members when designed to reach mere problems of discipline.

Plaintiff claims that he ceased to be a member of the David

Miller Church by consent of its preacher, while defendants claim otherwise; the evidence sustains the plaintiff's claim. There was no church rule; the action of expulsion was taken either by the preacher or bishop, or both, and by a vote of the church members.

There can be no dispute concerning the fact of the excommunication of plaintiff from the Old Order of Amish Church, and the promulgation of the ban against him pursuant to the long established Confession of Faith as above set forth. Plaintiff in his petition, however, claims that his excommunication was due to his leaving the church because of the action of the church body, while there is no denial of the claim by plaintiff that the preacher of the Miller Church gave consent to plaintiff's withdrawal long before the act of excommunication. Neither is there any controversy or dispute concerning the facts and reasons for the acts of defendants in placing plaintiff under the ban or "miting" him on account of his leaving the church, and his opinion and conduct concerning his opposition of the doctrine of "miting" and his leaving the church and his joining another church.

The only remaining question, therefore, is whether the act of defendants in placing plaintiff under the ban and in "miting" him constitutes a violation of a private right guaranteed by the civil law.

The facts developed present a novel question of religious liberty. The defendants assert the right of religious liberty to apply their belief in their "Confession of Faith" rendered holy by its antiquity, and their consequent right to apply and enforce its doctrine literally.

On the other hand, under our constitutional guaranty plaintiff himself must be granted equal right to entertain whatever views he may hold respecting the doctrines of his faith and religion. He has the right to dress as he pleases; he has the right to wear suspenders, to own an automobile, and to be a modern citizen if he chooses.

Religious liberty or immunity is a double edged sword. Plaintiff is entitled to believe what he pleases, and he also has the

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right to withdraw from a church and join another one if he pleases, especially in the absence of any rule to the contrary. If one does not believe in the doctrines of a church, he has the right to leave it and join another.

The court finds that there is in fact no question of church discipline presented by the evidence. According to the evidence plaintiff was "mited" by the seven defendants "in part for leaving the church" and "because he would not agree to mite anybody else," and partly because he wore suspenders with rubber in them, and would not comply with the orders of the preachers and bishops. Nowhere does it appear that the preachers and bishops were given power to enforce their creed.

But plaintiff was "mited" after he left the Miller Church and while he was a member of the Martinscreek Church, and out of the jurisdiction of the seven defendants.

The court finds from the evidence that plaintiff ceased to be a member of the church under the control of the Old Order of Amishites, legally so far as appears by any rules of the church. The preacher of the Miller Church gave his consent; and the evidence fails to show that there was any rule that prohibited him from leaving the church by consent of the preacher, or that prescribed any rule.

The court finds from the evidence that the Martinscreek Church which plaintiff joined, and the Bunker Hill Church of which he is now a member, is not affiliated with defendants and their churches; that when plaintiff was admittedly put under the ban or boycott by order of defendants he was at the time not under the control or jurisdiction or not subject to the discipline of defendants, not being a member of any one of their churches.

The evidence fails to show any rule of discipline or any custom that gave defendants the right to exercise control over or to discipline plaintiff at the time of placing the ban upon him.

The evidence shows concerted action by all of the defendants in placing the ban or boycott; it shows that under the orders and directions of defendants all members under the control and discipline of defendants were bound to obey their orders for fear of themselves being subjected to a like ban.

The evidence shows that the main reason for "miting" plaintiff was because it was claimed he had broken the rule of the church; that he would not "mite" anyone; that plaintiff had taken the position that he couldn't stay in the church and "mite" anybody; so "we mited him because he wouldn't mite any one else"; "that was the main thing for which we mited him"; he was "mited" "while he was a member of Martinscreek church." (Testimony of Preacher S. J. Mast.)

All defendants in their testimony admitted that they had directed the members of their church to "mite" plaintiff; they admitted that they had met together and "talked the matter over" and that they all acted in a concerted manner.

Defendants in their testimony concede that the members of their churches under the directions to "mite" plaintiff were bound to refuse to eat with him; bound not to work for him; that the rule was that even members of the family "can not eat with him at the same table; his daughter could not; couldn't pass things at the table; wouldn't sell to a 'mited' person." "Wouldn't let any of our men go and work for him all summer; wouldn't let any member of the church work for" one who was under the ban; "he would tell any member not to work for one who was under the ban"; if one violated the order "I would examine into it, and if they wouldn't quit, then we would 'mite' them. That's the way we understand the word of God; it would be right for the wife to 'mite' the husband." (Testimony of Noah P. Beachey, Bishop).

"Congregations were told that if they would do as Eli did they would be mited, and if they refused to mite Eli they would be mited." "Joseph (plaintiff's brother) was mited," and defendant Mast "Told the members of the church to 'mite' him because he refused to 'mite' his brother Eli." (Testimony of defendant Mast.) "He was mited because he refused to accept the confession of faith," said defendant Swartzentruber.

It must be concluded that in fact and law plaintiff was excommunicated and placed under the ban when he was not in fact a member of any of the defendants' churches; when they had no jurisdiction over him. In the absence of any rule for-

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bidding a member to withdraw from the church with the consent of the "preacher," it must follow that plaintiff, at the time the ban was placed on him, was beyond the jurisdiction of the defendants. Plaintiff was wholly within his right when he withdrew for the reason that he did not believe in the doctrine of literal "shunning," "miting" or "boycotting" members of the church by withdrawing all business and social intercourse from a "mited" member.

It is contended that there is no evidence that any persons actually refused to work for plaintiff, when called upon to assist in harvesting. But what more is essential than the admissions of the defendants that their church members were told as a matter of church discipline that they were not permitted to have social or business intercourse with him? Plaintiff knew full well how useless it would be to ask neighbors who were members of any of defendants' churches to assist him in his threshing or other farm work. Two actual instances of refusal to have business intercoures are shown by the evidence because of the ban.

The civil wrong of boycotting is in nature passive, a let-alone policy; and this is the theory upon which plaintiff founds his cause; he claims that defendants have unlawfully instituted and for seven or eight years maintained a boycott by withdrawal of all business intercourse with him.

The conditions and circumstances under which the doctrine of boycott originated have peculiar and pertinent application to the complaint in this case. The term had its origin in an incident that occurred in Ireland.

The co-called doctrine of boycott had its origin under peculiar circumstances between landlord and tenant, the former being represented by an agent named Captain Boycott, who served notice upon the tenants of his principal—Lord Earne. The tenants in retaliation sent Captain Boycott to "coventry" in a very thorough manner; Coventry is a town in Warwickshire, England; Webster thus defines the word Coventry: "to send to, to exclude, or to be excluded from society, or from the society to which one belongs."

An exposition of the origin and meaning of the term "Boycott" is found in *State v. Glidden*, 55 Conn., 46, 3 Am. St., 23 (1887).

"The word 'boycotting' is not easily defined. It is frequently spoken of as passive merely—a let-alone policy—a withdrawal of all business relations, intercourse and fellowship. We may gather some idea of its real meaning, however, by a reference to the circumstances in which the word originated. Those circumstances are thus narrated by Mr. Justin McCarthy, an Irish gentleman of learning and ability, etc. In his work entitled 'England under Gladstone,' he says. 'The strike was supported by a form of action, or rather inaction, which soon became historical. Captain Boycott was an Englishman, an agent of Lord Earne, and a farmer of Lough Mark, in the wild and beautiful district of Connemara. In his capacity as agent he served notice upon Lord Earne's tenants, and the tenantry suddenly retaliated in a most unexpected way—by, in the language of schools and society, sending Captain Boycott to Coventry in a very thorough manner. *The population of the region for miles round resolved not to have anything to do with him, and, as far as they could prevent it, not to allow any one else to have anything to do with him.* His life appeared to be in danger; he had to claim police protection. His servants fled from him as servants flee from their masters in some plague-stricken Italian city. The awful sentence of excommunication could hardly have rendered him more helplessly alone for a time. *No one would work for him; no one would supply him with food.* He and his wife had to work in their own fields themselves, in most unpleasant imitation of Theocritan shepherds and shepherdesses, and play out their grim eclogue in their deserted fields with the shadow of the armed constabulary ever at their heels. The orangemen of the north heard of Captain Boycott and his sufferings, and the way in which he was holding his ground, and sent him down armed laborers from Ulster. To prevent civil war, the authorities had to send a force of soldiers and police to Lough Mark, and Captain Boycott's harvests were brought in and his potatoes dug by armed Ulster laborers, guarded by the little army. If this is a correct picture, the thing we call a boycott originally signified violence.' " See 18 L. R. Ir., 430.

The nature of the alleged wrong complained here is, "passive merely—a let-alone policy—a withdrawal of all business relations, *intercourse and fellowship.*"

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As under the circumstances wherein the legal wrong of boycott originated, so here, all members of the Older Order of Amish Mennonites in Holmes county—some six or seven thousand persons—“resolved to have nothing to do with” plaintiff. And the defendants “as far as they could prevent it” resolved not to allow any of their church members to have business or social intercourse with plaintiff. As in the Captain Boycott case: no one would work for Ginerich; no one would furnish him food unless he was starving; no one would work in his fields; no one would assist him in harvesting; no one would have social intercourse with him. Plaintiff was cut off from social intercourse from the whole population of Amishites in Holmes county; he was in a way denied freedom to exercise his individual rights, or individual liberty by the decree of the preachers and bishops forbidding the many thousands of his sect to deal with him, or to have social intercourse with him; he was placed under external restraint and compulsion. Defendants’ acts operated to deprive plaintiff of his right to have free and uninterrupted business intercourse with the thousands of Amishites in his community, which right is a valuable legal right.

The right to unrestricted enjoyment of the family relationships and full, uninterrupted pleasure and happiness derived therefrom is a personal right entitled to protection at law.¹ According to the evidence the acts of defendants have resulted in serious interruption of and injury to these rights.

Carrying into effect the church doctrinal views concerning the “shunning,” the avoidance and the admonition not to keep company, to the extent shown by the evidence in this case against one who does not believe in such dogmas, and who in the free exercise of his own religious liberty has properly and legally withdrawn from a church adhering to such doctrine, constitutes not only an infringement upon plaintiff’s constitutional religious liberty, but is also in violation of his right of enjoyment of his right of the family relation, as well as his unrestricted right to free and uninterrupted business intercourse naturally incident to the particular business.

There can be no right or cause of action unless a legal right

(a) But not the

is violated. There surely can be no denial that every member of society is possessed of: 1, the right of religious liberty, consisting of the right to believe what he pleases, and to withdraw from a church that maintains and literally enforces a doctrinal belief by concerted action in derogation of his civil rights; 2, of the right of family relations and the natural inherent enjoyment thereof; and, 3, the right to unrestricted business intercourse and trade.

Concerning the legal phases of the first and third rights above named there can be no doubt. Concerning the second right named, viz: the family relation right, it may be truthfully contended that up to date no legal "mould" has been manufactured or prepared by means of which an injury to such right may be redressed.

But what right is more sacred than that a man shall not have his right to full enjoyment of the natural intercourse with his wife, his children and his brothers interfered with and cut off by fossilized religious doctrines and antiquated literal interpretation of portions of the Bible which make it compulsive upon wife, daughter and brother to literally shun the husband, father and brother because some strange and peculiar sect composed of Low Germans 397 years ago construed portions of the Bible as shown by Art. 16 of the Amish Confession of Faith. Some things become more precious by age, but the crude and unnatural conceptions as disclosed are in sharp conflict with modern legal civil rights, which tend to infringe upon inherent family and business life, and which harmonizes better with the views of his Satanic Majesty and his satellites or representatives on earth. Of course courts have nothing to do with men's religious views howsoever antiquated, except when such acts infringe civil right; all we need to state is that no religious views can be the means of infringing civil rights.

Up to date legal treatises and decisions have dealt with certain well-known classes of wrongs to family rights; no question like the present is found among the common law remedies. The wrong here complained of antedates the common law, taking us back to ancient Holland times nearly three hundred years ago,

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so that we have a problem with which the courts of common law probably never dealt. The Amishites were particular where they settled; being opposed to war and the warring contentions in the Eastern world, they came to America, settling in Pennsylvania, and from thence came to Ohio.

In this case the natural ties between father and daughter were practically destroyed by force of three hundred year old Amishite Confession of Faith; not so great injury was done the relation of husband and wife and that between brothers. One brother, however, who stuck to plaintiff brought upon himself the ancient curse of the Mennonite ban. This serious and unjust interference with the family relations of the Ginerich family, especially in the case of the daughter, is due to the tyrannical imposition of ancient Biblical interpretations in contravention of the civil rights of plaintiff.

We come finally to the third right, viz: the unrestricted right to business intercourse and trade. This brings us to the boycott and secondary boycott. It is admitted by all the defendants that they declared a ban and boycott against plaintiff some seven, eight or nine years ago; they admit that they have directed and required the members of all their churches not to deal with plaintiff; not to help or work for him, nor to have any kind of business dealings with him. They admit in evidence that they have given directions to all members of the churches to observe this ban, and that all of them are directed and required to boycott plaintiff, and that any of them who fails to heed this direction will be visited with a like penalty by direction of defendants in case he should fail to observe the order by having business dealings with plaintiff. It is therefore immaterial whether it be shown that there was any denial or refusal to serve or deal with plaintiff, because in the absence of such a showing the proof is conclusive that there has been a direct and secondary boycott according to the admissions of all the defendants. It would have been idle for plaintiff to have sought help of his neighbors whom he knew were bound to refuse to deal with him according to the directions of the defendants. The action of all the defendants was admittedly concerted, so that all the elements of boycotting are present..

It is not necessary to discuss the modern cases of boycott between capital and labor; the doctrines are well defined and understood, and the general principles are applicable. This is a peculiar and typical case of a very unjust boycott wholly at discord with American ideals of civil law and civil justice.

Reference may be made to some fundamental definitions.

A boycott is not unlawful unless attended by some unlawful act which in itself is illegal. It may be correctly used in the sense of the act of a combination of persons in refusing to have business dealings with another until another (the complainant) removes or ameliorates the conditions which are deemed inimical to the welfare of the members of this combination or some of them. 1 Words and Phrases, Second Series, p. 489. It is a combination to cause a loss to one person by coercing others, against their will, to withdraw from him, their beneficial business intercourse; by threats to do so the combination will cause similar loss to them. *Meier v. Spear*, 96 Ark., 618, 32 L.R.A.(N.S.), 792.

To render the term boycott applicable to the acts of defendants complained of by plaintiff, it would be essential that acts done resulted in injury to plaintiff's beneficial business intercourse, or tended so to do. The acts of defendants did have such tendency and effect.

Boycott is a combination between persons to suspend or discontinue dealings or patronage with another person or persons because of refusal to comply with a request of him or them. The purpose is to constrain acquiescence or to force submission on the part of the individual who by noncompliance with the demand has rendered himself obnoxious to the immediate parties, and perhaps to their personal and fraternal associates. *Anderson's Law Dictionary*.

The question finally is whether the order to mite, shun, or boycott plaintiff made by defendants as preachers and bishops of the Old Amish Mennonite Church, pursuant to the Confession of Faith above set forth, may be justified in law under a claim that it was promulgated and enforced by defendants pursuant to the religious belief and doctrine embodied in the Confession of Faith.

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There can be no dispute that defendants ordered the ban pursuant to a religious belief, in good faith and without malice. The rule, however, is well established that while legislative and judicial bodies have no power of control over religious belief or opinion, still the court has full power and jurisdiction to deal with acts in clear violation of social duties or rights of persons.

Acts done in the name of religious belief or under the guise of religious liberty clearly subversive of public right and morals, or of individual civil right, may be controlled and prohibited by the judiciary. Evil acts dangerous to public and individual welfare, though sanctioned by religious concept may be forbidden, punished or prohibited. *State v. Marble*, 72 O. S., 21; *Bloom v. Richards*, 2 O. S., 387, 392.

“There is no legal authority to constrain belief, but no one can lawfully stretch his own liberty of action so as to interfere with that of his neighbors, or violate peace and good order. The whole criminal law (and civil law) might be practically superseded if, under pretext of liberty of conscience, the commission of crime is made a religious dogma. It is a fundamental condition of all liberty and necessary to civil society, that all men must exercise their rights in harmony, and must yield to such restrictions as are necessary to produce that result.” *Matter of Frazee*, 63 Mich., 396, 6 Am. St., 310.

Courts may grant relief in civil actions where religious practices or acts done pursuant to a religious belief result in a plain infringement upon a right guaranteed by the rules of civil law. An individual or an organization of persons into a religious society founded upon religious faith, belief or doctrine can not in the practice thereof, pursuant to a general plan or concert of action, carry out or put into effect a religious practice which results in clear infringement of a civil legal right guaranteed by civil law. Each citizen possesses the right to deal and trade with any and all persons interested in the same business. So here the defendants have no right to put into practice their religious belief that a member of one of their churches, who withdraws from the same because he can not accede to a particular belief,

shall be placed under a ban, mited or boycotted for a long period of time, or for the remainder of his life, unless he yields to the demands of the preachers, bishops, repents and asks forgiveness. This constitutes an unlawful interference with private right for which there can be no religious immunity. This in effect is a boycott which may be relieved against in equity.

The finding and judgment is in favor of plaintiff and against defendants.

An order may be drawn restraining and enjoining defendants from further carrying into effect the order to mite and boycott plaintiff in so far as the same affects his religious liberty, his family relations, and his right to trade and deal with any and all members of the Old Order of Amish Mennonite Church. The order may direct and require defendant not only to revoke their former order and direction to the members of their churches, but to mandatorily direct and require the members of their churches that it is no longer their duty to observe and carry out the boycott.

Relief by way of compensation in money is not allowed.
The costs are assessed against defendants.

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Ex Parte Mabel Mason.

QUARANTINE OF ONE SUFFERING FROM A VENEREAL DISEASE.

Common Pleas Court of Hamilton County.

EX PARTE MABEL MASON.

Decided, June 14, 1919.

Police Power—As Exercised by the State Board of Health—"Supreme Power" Construed to Mean Supreme Legal Discretion—One Infected with a Contagious Disease Not Entitled to Trial by Jury as to the Fact of such Infection—Rule of Reasonable Doubt Not Applicable.

The regulations adopted by the state department of health for the prevention and cure of venereal disease are a proper exercise of the police power, and habeas corpus does not lie for the release of a prostitute who is infected with said disease and has been placed in quarantine by order of said board.

A. Lee Beaty, for petitioner.

George T. Poor, for State Department of Health.

E. S. Morrissey and *C. D. Pichel*, for respondent.

DARBY, J.

Mabel Mason, the petitioner, alleges that she is unlawfully restrained of her liberty by Dr. A. C. Bachmeyer, superintendent of the Cincinnati General Hospital.

The respondent files his answer admitting the detention of Mabel Mason and justifying it for the following reasons: that she had been admitted to the said hospital upon a quarantine order issued by the health officer of the city of Cincinnati acting under the directions of the acting health commissioner of Ohio. A copy of the quarantine order of the health officer of Cincinnati is attached to the answer, and sets forth that the respondent was ordered to quarantine the said petitioner by reason of the directions of the commissioner of health, and that the said petitioner had been found or is reasonably suspected of

having a venereal disease. Also attached to the answer is the direction of the state commissioner of health to the health officer of Cincinnati directing the quarantine of the petitioner.

The state department of health was created by the act of March 31, 1917 (107 Ohio Laws, 522), and has conferred upon it "all the powers and (shall) perform all the duties now conferred and imposed by law upon the state board of health."

The powers of the state board of health are set forth in General Code, Section 1237, as follows:

"The state board of health shall have supervision of all matters relating to the preservation of the life and health of the people, and have supreme authority in matters of quarantine which it may declare and enforce when none exists, and modify, relax or abolish when it has been established. It may make special or standing orders or regulations for preventing the spread of contagious or infectious diseases * * * and for such other sanitary matters as it deems best to control by a general rule. It may make and enforce orders in local matters when emergency exists or when the local board of health has neglected or refused to act with sufficient promptness or efficiency, or when such board has not been established as provided by law."

Acting under the authority conferred upon it, the state department of health, on May 2, 1918, adopted certain rules and regulations for the prevention of venereal diseases. These rules define what are designated as venereal diseases, provide for reports of known or suspected cases of such, for instruction to patients and investigation of cases by local health officers. Rule V is as follows:

"*Examination of cases; enforcement.*—City, village and township health officers are hereby empowered and directed to make or cause to be made such examinations of persons reasonably suspected of having a venereal disease as may be necessary for carrying out these regulations. Such examinations shall be made only by regularly licensed physicians. All known prostitutes and persons associating with them shall be considered as reasonably suspected of having a venereal disease. Boards of health and health officers shall cooperate with the proper officials whose duty it is to enforce the laws against prostitution, and shall oth-

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erwise use every proper means for the repression of prostitution which is hereby declared to be a prolific source of venereal disease.”

It was shown upon the hearing that the petitioner is a known and common prostitute, making her livelihood by such practice in the city of Cincinnati, and that she was at the time of the hearing infected with venereal diseases.

Rule VI of the regulations of the state board provides as follows:

“*Quarantine of diseased persons.*—The health officers, when directed by the state commissioner of health, shall immediately institute measures for the protection of other persons from infection by any venereally diseased person, and shall quarantine any person who has, or is reasonably suspected of having, a venereal disease whenever, in the opinion of the state commissioner of health, quarantine is necessary for the protection of the public health. In establishing quarantine the health officer shall designate and define the limits of the area in which the person known to have or reasonably suspected of having a venereal disease is to be quarantined, and no other person than the attending physician, dentist, or necessary attendant shall enter or leave the area of quarantine without the permission of the health officer.”

The order of the health officer established the quarantine in this case to be that of the area of the Cincinnati General Hospital.

On behalf of the petitioner it is claimed that the provision authorizing the quarantine and examination provided for by the regulations is in contravention of Article XIV, Section 1, of the Constitution of the United States, and also that it violates Article I, Section 5, of the Constitution of Ohio, which latter provides that the right of trial by jury shall be inviolate.

In *Board of Health v. Greenville*, 86 O. S., 1, the Supreme Court sustained an act authorizing the state board of health to require the purification of sewage and public water supplies as a valid and constitutional exercise of the police power of the state. On page 20 of the opinion the court, speaking of the propriety of declaring a law unconstitutional, uses this language:

“A court is not authorized to adjudge a statute unconstitutional where the question of its constitutionality is at all doubtful. The question of the constitutionality of every law being first determined by the Legislature, every presumption is in favor of its constitutionality. It must therefore clearly appear that the law is in direct conflict with inhibitions of the Constitution before the court will declare it unconstitutional.”

Section 1237 heretofore referred to which fixes the general powers and duties of the state board of health gives such board and its successor, in matters pertaining to the prevention of the spread of contagious and infectious diseases and quarantine, as broad powers as could be well granted. While the term with reference to quarantine “supreme authority” is used, that must be understood as meaning supreme legal discretion or authority and not arbitrary power.

The question as to whether or not a jury trial should be required in such case is settled in *Prescott v. State*, 19 O. S., 184. The statute under consideration in that case authorized a grand jury to commit a youthful offender to the house of refuge or reform farm, instead of indicting him and causing his prosecution by the ordinary methods. It was objected in that case that this was violative of the Constitution of Ohio and the Federal Constitution. The court said on page 197:

“The amendment to the Constitution referred to has no bearing on the case. That provision does not operate as a limitation of the power of the state governments over their own citizens, but is exclusively a restriction upon federal power. This has been repeatedly decided by the Supreme Court of the United States, and in the late case of *Twitcheil v. Commonwealth*, 7 Wall., 321, was not regarded as an open question.

“The provisions referred to in our state Constitution relate to the preservation of the right of trial by jury and the rights of the accused in criminal prosecutions. We do not regard this case as coming within the operation of either of these provisions. It is neither a criminal prosecution nor a proceeding according to the course of the common law in which the right to a trial by jury is guaranteed.

“The proceeding is purely statutory; and the commitment in cases like the present is not designated as a punishment for crime

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but to place minors of the description and for the causes specified in the statute under the guardianship of the public authorities named for proper care and discipline.”

The next contention of the petitioner is that the regulations authorize her detention if “reasonably suspected of having a venereal disease.” It is said that the detention is actual, and that to detain one and deprive him of his liberty, except upon conviction beyond a reasonable doubt, is not authorized by the laws of Ohio. The Supreme Court in the Prescott case, *supra*, has settled the question that matters such as this are not criminal in their nature; and the rule of reasonable doubt, of course, could have no effect. If the state board has the authority which it has exercised in this case, it would be entirely destructive of its purposes if, before one could be treated and quarantined, there must be positive evidence in somebody’s hands that the person is infected with the disease. If one is suspected of the commission of a felony, and there is reasonable ground to believe that he is guilty, an arrest may be made without a warrant. If one is reasonably suspected of carrying concealed weapons he may be arrested without a warrant, and the arrest is justified if he is found actually to be carrying concealed weapons. *Ballard v. State*, 43 O. S., 340.

In *State v. Racskowski*, 86 Conn., 677, there was a prosecution for the violation of an order of the health officer quarantining the defendant and her children on account of their supposed infection with scarletina or scarlet fever. The first syllabus is as follows:

“Before a lawful order of quarantine can be made under General Statutes 2549, the health officer must have a reasonable belief that the person ordered into confinement is afflicted with a malignant, infectious or contagious disease.”

That case is a direct authority for the department of health to pass the regulation authorizing the quarantine of persons reasonably suspected of having venereal diseases. In *Turner v. Toledo*, 15 Cir. Ct., 627, it is held that,

“Boards of health may, if they think best for the safety of the inhabitants, remove persons who have dangerous diseases to a separate house or confine them to their own. It is unquestionable that the Legislature can confer police powers upon public officers for the protection of the public health.”

In *Staas v. State*, 15 Cir. Ct. (N.S.), 189, the syllabus is as follows:

“1. An ordinance forbidding the sale of milk at retail unless it is contained in sealed glass bottles is not unreasonable in its general operation; and a conviction of violating such ordinance will not be set aside on the ground that some other regulation might better serve the public welfare.

“2. Nor is authority to pass such an ordinance an unwarranted delegation of legislative power.”

In that case the prosecution was for violating a regulation of the board of health.

Haverty et al v. Bass, 66 Me., 71; *Whidden v. Cheever*, 69 N. H., 142, and *Parker and Worthington on Public Health and Safety*, Section 118, support the general power and authority of local health authorities acting under legislative power to quarantine persons affected or afflicted with a venereal disease or exposed to it.

In line with this general subject are what are known as the vaccination cases, in which the regulations of local school boards forbidding the attendance at public school of children who have not been vaccinated or properly excused from the same, are sustained. In *State ex rel v. Board of Education*, 76 O. S., 297, the Supreme Court of Ohio very definitely sustained the authority of the board of education to pass such regulations, and said:

“3. Whether a rule or regulation adopted by the board of education under favor of the provisions of the above Section 3986 is a reasonable rule or regulation is to be judged of in the first instance by the board of education; and the courts will not interfere unless it has been clearly shown that there has been an abuse of official discretion.”

To the same effect is *State Board of Health v. Board of Trustees*, 13 Cal. App., 514.

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The regulation in this case is a proper and legal exercise of local police power, not in contravention of United States Constitution, Article XIV, Section 1.

The prevalence of venereal diseases is a fact well known. The spread of these diseases results very largely from prostitution. It is not only the right but the imperative duty of the state to protect the public from such diseases when and as it can. Public prostitution is a wrong in itself. Those who practice it can not complain if the state authorities employ any means, no matter how drastic, to stamp out the spread of the disease.

The regulations adopted by the state for the prevention of the spread of these diseases by treatment and cure are a proper exercise of the police power of the state. The petitioner having been shown to be one of the class known as common prostitutes, and being infected with the objectionable disease, is clearly within the regulations; and her detention and quarantine were justified under the ample power conferred by the General Code upon the state department of health.

The petition is dismissed.

CONVERSION OF PART OF CROP BY TENANT.

Common Pleas Court of Montgomery County.

FRANK J. LIGGETT V. THE AMERICAN CIGAR COMPANY, SAMUEL CASSON AND LUCY CASSON.*

Decided, July 23, 1918.

Landlord and Tenant—Lease of Tobacco Land on Shares—Constitutes a Tenancy in Common—Custom of Locality as to Provision of Barns and Sheds—Interest in Crop Transferred by Tenant to His Wife—Sale by Her of Part of the Landlord's Share—Purchaser without Title.

A tenant of farm land on the basis of a division of the crops is a tenant in common with the landlord, and the sale by him or his assignee of any part of the crop belonging to the landlord constitutes a conversion for which judgment will lie against both the vendor and the vendee for the value of the crop so illegally sold.

SNEDIKER, J.

In this case the plaintiff sues for the conversion of his interest in a certain crop of tobacco. Plaintiff is the owner of a farm in Miami township, this county. The defendant, Samuel Casson, since the first day of March, 1912, and until and during the year 1915, was the plaintiff's tenant. Prior to the entering into the possession of the farm by the defendant, Samuel Casson, a written farm contract was made by and between the plaintiff and Casson. By this contract, which, by the way, was drawn not by a lawyer but by a layman, it is provided: "There must be fifteen acres of tobacco raised, half shared. The tenant gives half of tobacco and trash tobacco and also half of everything. Rails and lath in the tobacco shed left in the building; tenant has no right to use for anything but tobacco. In selling of tobacco I must be consulted about price. We never want to divide the crop."

*Affirmed by the Court of Appeals, April 5, 1919.

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This contract, with the provisions heretofore cited, was in existence and binding upon the parties during the year 1915. In that year the defendant, Casson, planted and harvested a field of tobacco of about fourteen and a fraction acres. A part of this tobacco was cured and prepared for market. Ten acres, as we remember, were cut, seven acres of which were housed in what Casson designated as a good shed, and three acres in a pole shed. The remaining four acres were uncut and left standing in the field. The excuse given by Casson for his failure to cut the remaining four acres was that there had not been provided by the plaintiff sufficient sheds for the purpose of housing the tobacco, and Casson's claim is that there was a custom and usage in the vicinity of the farm and elsewhere to the effect that the landlord is required to build or supply proper shed or barn space for all crops raised by the tenant, including tobacco, to furnish rails and lath to the tenant to hang tobacco in the shed. It is on account of the alleged failure of the plaintiff to comply with this custom or usage that the controversy arises as between the plaintiff and the defendant with respect, not only to the four acres not harvested, but also with regard to the three acres that were put in the pole shed and to the balance which was stored in the good shed.

Subsequent to the cutting of the ten acres, and on November 8, 1915, Samuel Casson, for an alleged consideration of \$500, sold and conveyed to Lucy Casson, his wife, personal property, included in which was his undivided one-half of sixteen acres of tobacco, and by such conveyance he intended to include the tobacco here in question.

After the conveyance of this undivided half to her Lucy Casson sold to the agent of the American Cigar Company, and thereafter delivered to that company twenty-five boxes full of tobacco for a consideration of \$827.36. All of the tobacco so sold to the American Cigar Company was of the best of the crop, and there was left upon the farm only three boxes full of tobacco, trash tobacco, and the uncut and depreciated tobacco in the field.

The division as made by Lucy Casson, who by the conveyance of her husband became the owner of the undivided one-half of the crop, carried out the idea of Samuel Casson to the effect that on account of the failure of the landlord to furnish proper sheds, and on account of his inability because thereof to harvest and safely house the entire crop, the blame should fall upon the landlord, and for his interest he ought to be only entitled to take what was in the field, what was trash and so much of good tobacco as was necessary to make up one-half of the entire crop.

After the sale made to the American Cigar Company, the plaintiff sold the three boxes left upon the farm by these defendants and received therefor from his purchaser the sum of \$96.99, which, as we understand, included the value of the cases in which the tobacco was contained.

This being a short statement of the facts, what were the rights of the parties in question with respect to the tobacco?

The contract between the plaintiff and Casson, in our opinion, constituted a lease, the force of which was to make Casson a tenant of the plaintiff, with an agreement that there should be, among other things, a division of all the crops. "A contract by which the owner of land lets it to another for cultivation and agrees to receive as compensation a portion of the specific products, creates a tenancy in common between them in such products." 34 Ala., p. 167. The effect of such tenancy in common as was created by this contract is that "the ownership of the crop is in both landlord and tenant." 21 W. L. B., page 249.

Being the owner of an undivided half of the crop, it was the privilege of Casson, if he saw fit so to do, to convey such undivided half to his wife, and whether or not the consideration for such conveyance was sufficient in amount for the property transferred, we need not now consider. When the tobacco was transferred to Lucy Casson she thereupon became, as her husband was before her, a tenant in common with the landlord, her interest being the undivided one-half of the crop. To this time

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the defendants, Samuel Casson and Lucy Casson, acted strictly within their rights. But after acquiring the title to the undivided half of the tobacco, Lucy Casson sold and conveyed the number of boxes heretofore mentioned to the American Cigar Company, and as and for her half did, as we have said, select entirely out of what was the best of the tobacco for the purposes of such sale, leaving but three boxes, the uncut tobacco and the trash for the landlord, and this division was so made because of her husband's complaint with respect to sheds. In so selecting the best part of the tobacco and appropriating it to herself for the purpose of sale, in our opinion, Lucy Casson was guilty of conversion in so far as she made an unequal division of the good tobacco.

While we think it is true that proof of the usage in the neighborhood with respect to the building of sheds by the landlord is competent for the reason that it does not vary but adds a term to the contract made between the parties, which is not contrary to any known statutory or common law provision effective with respect to the contract as it is written, still what was conveyed to Lucy Casson was an undivided one-half of the tobacco as it stood, and it was not her privilege to make a division except on equal terms with the landlord.

If there was a controversy as between her husband and the landlord in regard to shedding, Casson, contending that the usage was a covenant upon which he had a right to rely, was not entitled to do more than to resort to the courts to have an ascertainment of his damage on account of the breach of the custom by the plaintiff. When Lucy Casson divided, or undertook to divide the tobacco in the manner in which she did she invaded the rights of the plaintiff. She committed conversion with respect to the plaintiff's interest in the tobacco which she sold to the American Cigar Company. If the defendant, Lucy Casson, committed conversion when she sold the tobacco to the American Cigar Company, then to so much tobacco as she converted the American Cigar Company acquired no title as against this plaintiff. 11 O. Rep., page 364. And the American Cigar Com-

pany, so far as this transfer is concerned, can make no greater claim to innocence as a purchaser than the plaintiff may make to innocence as an owner.

The same principle of conversion where a purchaser buys personal property from one who is not the owner thereof, is carried into the cases of *Brockhaus & Bro. v. Kline*, 8 W. L. B., page 205, and the case of *Hamet v. Lecher*, 37 O. S., 356.

If the American Tobacco Company did commit conversion when it took from Lucy Casson property of which she was not the sole owner, then it is bound to account to the plaintiff for the value thereof, and our finding is in favor of the plaintiff as against the defendants Lucy Casson and the American Cigar Company, in the sum of \$399.29. The trash tobacco which was left on the farm, being practically valueless, we do not take that into account in making our finding.

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**AS TO DEDICATION OF SPACES MARKED "PARKS" IN THE
PLAT OF A SUBDIVISION.**

Common Pleas Court of Franklin County.

ROBERT THOMPSON V. THE CITY OF COLUMBUS, OHIO.

Decided, April 4, 1919.

Dedication—Subdivision Platted and Recorded and Lots Sold with Reference to Said Plat—Spaces Marked "Parks" Held to have been Dedicated to the Public Use—Intention of Owners Who Platted the Subdivision Controls.

1. Where certain spaces in a platted addition to a municipality are marked "Park" and the lots are sold with reference to the plat so recorded, an intention is manifested on the part of the owners of the subdivision to dedicate the space to the public use, notwithstanding they were not specifically so dedicated as were the streets and alleys; and in such a case intention governs and dedication will be assumed.
2. But were the owners and their assigns not bound by an intention so manifested, dedication was effected or operated by way of estoppel where the city by unequivocal acts has accepted on the part of the public the spaces so dedicated.

George D. Jones on behalf of the plaintiff.

Charles A. Leach and *E. W. McCormick*, contra.

RATHMELL, J.

The plaintiff sues to recover the possession of certain real estate alleged to belong to him, being two narrow strips of land lying east of Summit street originally embraced within Indianola Summit Addition. The defendant denies generally the claims of plaintiff.

It appears that on June 16, 1892, the plaintiff together with nine other persons, lessees under a ninety-nine year lease, and the lessor, all representing the entire interest in the real estate platted 133.182 acres just outside the limits of the city in

Clinton township, Franklin county. The plat showed the land divided into several hundred lots bordering on streets and alleys, and the two spaces within Indianola avenue, in controversy here, marked "park." The plat was acknowledged before a notary public, by the makers, as a true representation of their subdivision, was certified as correct by deputy county surveyor, was approved by the county commissioners, and was filed for record and recorded in plat book 5, p. 140, by the county recorder on June 27, 1892.

The certification stated that the streets and alleys as set forth on said plat are hereby dedicated to the public use as highways. Lots were sold with reference to the plat and all have been sold.

It is contended by defendant that this constituted a statutory dedication to the public use of the two spaces each marked "park."

The plaintiff contends that the owners having designated the streets and alleys as dedicated to the public use, the spaces marked "park" were excluded. All statutory requirements, it appears, were conformed to in the matter of platting a subdivision or addition to a municipal corporation. And by force of the statute, G. C. 3589, such a plat or map vested fee simple of all such parcels of land as were therein expressed, named, or intended for public use in the county for the uses and purposes therein named, expressed or intended. This addition was subsequently annexed or incorporated or taken into the city and there is no contention, that any title or right acquired by the county did not inure to the city. No omissions of the formalities for a statutory dedication are pointed out by diligent counsel in the matter of platting the land. But counsel for plaintiff contends that the spaces marked "park" not having been named in the certification of the owners were excluded and not dedicated.

It would appear that the mere failure to designate that the "parks" were thereby dedicated to public use is not conclusive of failure to dedicate, if it should appear that it was the intention of the owners to dedicate them.

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Suppose in view of the statute G. C. 3585, affecting municipalities, the owners had specifically named and designated that the parks so marked were thereby dedicated to the public use, and had made no mention of the streets and alleys, shown on said map as apparently intended for such, would it be contended in the absence of language to the contrary that the streets and alleys so shown would not be dedicated? If not, then the converse would follow. The language of the statute is that such a plat or map shall be deemed in law a sufficient conveyance to vest the fee simple of all such parcels of land as are therein expressed, named or intended for public use, for the uses and purposes therein named, expressed or intended. So if it can be found that the owners intended the spaces marked "park" for public use, the dedication would follow.

"When the owner of real property lays out a town upon it and divides the land into lots and blocks intersected by streets and alleys and sells any of the lots with reference to such plan; or when he sells with reference to the map of a town or city in which his land is so laid off, he thereby dedicates the streets and alleys to the use of the public, unless it appears either by express statement in the conveyance or otherwise that the mention of the street was solely for purposes of description and not as a dedication thereof. On the same principle the owner will be held to have dedicated to the public use such pieces of land as are marked on the plat or map as squares, courts or parks." 13 Cyc., 455.

Doctrine of dedication to public uses is extended and applied to parks and public squares; and the fact of dedication may be established in the same manner as in case of streets. *Morrow v. Highland Grove Traction Co.*, 219 Pa., 619, 624. An intent on the part of the owner to dedicate is essential and such intention can be found in the facts and circumstances of the particular case, manifested by the acts of the land owner.

"Where a plat is made and recorded and lots sold with reference thereto, the requisite intention is generally indisputable." *Dillon on Mun. Cor.*, Section 10795.

“The word ‘park’ written upon a block upon a map of city property indicates a public use; and conveyances made by the owner of the platted land by reference to such map operate conclusively as a dedication of the block.” *Price v. Plainfield*, 40 N. J. L., 608; *Maywood Co. v. Village of Maywood*, 118 Ill. 61.

“Where there has been laid out and filed a plat of land as an addition to a city upon which plat a portion of the land is designated as a ‘park’ and there has been a sale of lots in reference to the plat, the dedication of the ‘park’ thus effected is to the public.”

“An irrevocable dedication of land is effected by designating certain land on a map filed in the county recorder’s office as a ‘park’ and selling lots with reference to the map.” *Rhode v. Town of Brightwood*, 145 Ind., 21.

In *Archer v. Salinas City*, 93 Cal., 43, it is held:

“The word ‘park’ written upon a block of land designated upon a map of property within the limits of an incorporation city or town, signifies an open space intended for the recreation and enjoyment of the public, and this signification is the same whether the word be used alone or with some qualifying term as ‘Central Park.’ And in the opinion the court says: ‘The word “park” written upon a block of land designated upon a map is as significant of a dedication and of its use to which the land is dedicated as is the word “street” written upon such map.’” See also *Steel v. Portland*, 23 Oregon, 176; *Commonwealth v. Hazen*, 207 Pa., 52, 56; *Dillon on Municipal Corporations*, 5th Ed., 1096.

In *Erik v. Ramstad*, 31 N. D., 504, reported in L. R. A. 1916 B., 1160, is a well considered and analogous case. There a tract marked “Lincoln Park” was involved in a plat of land indorsed on which was that the owner had caused the same to be platted and hereby donates and dedicates to the public use all the streets and alleys thereon shown. Just as in this case there was no express mention of the “park” and just as in this case lots were sold with reference to the plat. In that case it was held: (1) There can be no dedication in the absence of an

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intent on the part of the owner to dedicate. (2) Such intent, however, is to be ascertained from the acts of the owner and not from the purpose hidden in his mind. (3) When the owner plats his property and sells lots with reference to the plat, he thereby manifests an indisputable intention to dedicate the public places shown on such plat. (4) the word "park" written upon a lot of land designated upon such plat is as significant of a dedication and of the use to which the land is dedicated as is the word "street" written thereon. (5) The ordinary American meaning of a "park" is a piece of ground set apart and maintained for public use, and laid out in such a way as to afford pleasure to the eye as well as opportunity for open air recreations, and the term is not applicable to private inclosures enjoyed by the few to the exclusion of the public.

This was held a statutory dedication and is illustrative of the case at bar.

But it is contended the case of *Abraham v. Cincinnati*, 13 O.D.(N.P.), 619, is decisive of the question of statutory dedication, and is adverse to such a claim. It is stated as the basis of the ruling in that case that there was no statutory dedication of the park because there was no acknowledgment on the plat designating and intending the park to be dedicated. It is significant that the rule that when the owner plats his property and sells lots with reference to the plat, he thereby manifests an indisputable intention to dedicate the public places shown on such plat not stressed or apparently mentioned. The principle that the express mention of one thing implies the exclusion of another thing like other rules of construction is useful only for the purpose of arriving at the intent of the parties, and will not be applied if not in harmony with such intent. (Section 17 A. & E. Ency. of Law, p. 25 and cases cited.)

The plat in question set forth the streets and alleys and the spaces marked "park." If this manifested an intention that they were intended for public use then by force of the statute the plat is deemed a sufficient conveyance to vest the fee of such parcels in the county for the uses and purposes intended.

But if for any reason, the platting of the land by the owner of the Indianola Summit addition was not a statutory dedication, we think by all the requirements of law it was a common law dedication of the spaces marked "park."

If it was not a grant, dedication to public use was effected or operated by way of estoppel.

The essentials of such a dedication are that the owners must have intended to dedicate the spaces in question to the public use and an acceptance on the part of the public. (*Lessee of Village of Fulton v. Mehrenfield*, 8 O. S., 440, 446.) And these may be shown by the acts and declarations of the parties and the surrounding circumstances.

We think it is clear as shown by the proof that this laying out and platting the Indianola Summit addition, dividing it into lots and spaces marked "park" by the owners and selling lots with reference to such plats, in view of the authorities hereinbefore cited, that the owners thereby manifested an unequivocal intention to dedicate the spaces marked "park" in question to public use, and did so dedicate them. And the city by unequivocal acts has manifested an intention to accept the park spaces on behalf of the public. In 1910 the city annexed the territory including these parks to the city. In the same year it changed the name of the street embracing these parks from Indianola to Iuka. Later it curbed and improved this street and took a part of the park space for the street.

In December of 1914 the city, in an action to quiet title against the county auditor, who was attempting to sell these specific parks as forfeited land, asserted its ownership of these parks as trustee for the public. And the title was quieted in the city and its right to possession maintained. It is claimed the plaintiff was not a party to this suit. It is nevertheless an unequivocal act on the part of the city of acceptance on the part of the city of the parks for park purposes. And these acts on the part of the municipal authorities were all prior to any revocation on the part of plaintiff sought to be asserted in this action. What is a reasonable time of acceptance necessarily depends on the circumstances of the particular case.

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“It may be years before the convenience of the public or those who live upon the adjacent lots requires that they formally be taken in charge by the municipal authorities, and in the absence of acts showing positive intention to revoke on the part of the owner, the right to accept the dedication will usually continue until the wants and convenience of the public require the use of the dedicated streets.” (Dillon Municipal Corporations, 5th Ed., 1089.)

And the same is equally applicable to the formal taking charge of parks by municipal authorities.

In *Archer v. Salinas City*, *supra*, thirteen years intervened between the filing of the subdivision and the improvement or taking possession by the city, but same was held not unreasonable.

It is claimed the fact that the county authorities placed the spaces marked “park” on the tax duplicate indicates they did not regard them as public parks.

It is quite significant that though placed on the tax duplicate neither the plaintiff nor any of his associates ever paid any taxes on these park spaces. This failure to pay is consistent with and supports the claim that the owners intended them for public parks. However, in said proceeding noted above to quiet title all said taxes were stricken from the tax duplicate; and it has been frequently adjudged that the erroneous action of officials in taxing property alleged to have been dedicated does not estop the municipality from claiming a dedication; and could not impair the rights of the public or confer rights upon the plaintiff. In such case the assessing officers do not represent the public for the acceptance of dedications. *Erik v. Ramstad*, 31 N. D., 504, *supra*; *San Leandro v. Le Breton*, 72 Cal., 170, 177; *Reynolds v. Newton*, 14 C. C., 433; *Daiber v. Scott*, 3 C. C., 313; McQuillan on Municipal Corporations, Section 1594.

Moreover, aside from any question of statutory or common law dedication on the part of the owners of the parks in question, the plaintiff has failed to show any legal interest or ownership in the premises involved.

It appears from the evidence that prior to December 7, 1895, the plaintiff Robert Thompson had acquired all the interests of the several lessees and their successors in interest, conveyed by the indenture or lease of Robert E. Neil, trustee, to N. B. Abbott et al, under date of May 10, 1892.

On said date, December 7, 1895, Robert Thompson and wife quitclaimed all their interest to the Summit Land Company in some 730 lots all of Indianola Summit addition as per recorded plat of same; also all said grantors' right, title and interest in, to and under a certain agreement and lease heretofore executed and delivered by Robert E. Neil, Trustee, to N. B. Abbott and others, dated May 10, 1892.

On the same day, December 7, 1895, Chas. E. Miles, A. G. Pugh, John J. Dun, John A. Coles, Eli P. Evans, Robert Thompson, Howard C. Park, partners under the firm name and style of the Summit Land Company, and Robert Thompson as trustee for said partnership, conveyed to the Summit Land Company, a corporation, all the personal property and property of every kind and description, corporeal and incorporeal, belonging to said partnership, or to them, or either of them in trust for the partnership, including rights of forfeiture and other rights under title bonds issued by the partnership.

These conveyances left no remnant of right or interest in or to any part of the Indianola Summit addition in Robert Thompson. All the interest Robert Thompson held as one of the lessees of Robert Neil, trustee, or as grantee of any of the successors of said lessees of said Neil, trustee, subsequent to said lease, came through and was limited by said lease and same, whether individual or in trust, were conveyed by the conveyances mentioned by Robert Thompson to the Summit Land Company, and he has acquired no interest or title since.

The plaintiff has shown no right of recovery. The finding is in favor of defendant. The petition is dismissed at plaintiff's cost.

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Baker v. Addyston.

**INFANT NOT BOUND BY DECLARATIONS OF
NEXT FRIEND.**

Common Pleas Court of Hamilton County.

MARY E. BAKER V. VILLAGE OF ADDYSTON, ETC.

Decided, April Term, 1919.

Municipal Corporations—Projection upon Sidewalk Forming a Stumbling Block—Child Falls over It and Into a Ravine—Statement of Parent as Next Friend not Binding upon Infant, When.

1. A stone projection six inches high, extending ten inches over a sidewalk, formed by the ends of two retaining walls coming together in such a way that the sidewalk side of the walls was not straight, but formed an angle or offset, is not a usual or customary mode of constructing a sidewalk, and where said projection is so close to a ravine on the opposite side of the retaining walls that if a pedestrian stumbled over said obstruction there was likelihood of his being precipitated into said ravine, it is for the jury to determine whether said sidewalk so constructed was reasonably safe for travel in the ordinary mode.
2. A letter written by the father and next friend of an infant plaintiff demanding settlement for injuries upon a stated basis is not competent as an admission by or on behalf of the infant, and when it has no tendency to contradict or impeach the testimony of the father on direct examination, it is not admissible on his cross-examination.

Baker & Baker, for Plaintiff.

A. E. B. Stephens and *Fred E. Niederhelfman*, for the Village of Addyston.

MATTHEWS, J.

This case comes on to be heard upon a motion of the defendant for a new trial.

The action is one of Mary E. Baker, an infant ten years of age, by her next friend, against the defendant, a municipal cor-

poration, for personal injuries received by her because of an alleged defect in the public sidewalk, located in said corporation. This defect consisted in an elevated projection six inches high, and extending ten inches over the sidewalk, and was caused by the joinder of two retaining walls coming together in such a way that the street side of the walls made an angle or offset. On the opposite side of the wall was a ravine several feet in depth, and there was no barrier or fence separating the sidewalk from this ravine other than the wall itself, which was not more than ten inches in height above the sidewalk.

The plaintiff, who at the time, was a child eight years old, when proceeding along this sidewalk, struck her foot against the projecting stone wall and fell over the wall into the ravine and received injuries, the most serious one of which was a broken collar bone.

It is contended that the condition of the sidewalk was reasonably safe for travel in the usual mode, and that the case is to be classified with those where an injury occurs by reason of certain conditions in the sidewalk that are usual and customary in sidewalk construction.

Reliance is chiefly based upon the case of the *City of Cincinnati v. Fleischer, Admr.*, 63 Ohio St., 229, the syllabus of which is:

“The statute requires of municipalities the exercise of ordinary care in the construction and maintenance of streets and sidewalks; but that duty is not violated by permitting a carriage block of the usual size to occupy the usual position of such blocks, near the curb and not upon that portion of the sidewalk which is designated for the use of pedestrians going upon or passing along the walk.”

And at page 234, the court in discussing the circumstances, said:

“It (this block) was within that portion of the street by the curb which, according to common knowledge, is devoted to carriage blocks, lamps, hitching posts and shade trees, which pedestrians of ordinary care observe and avoid.”

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In the opinion of the court, the case at bar does not fall within the same class of cases as that of *Cincinnati v. Fleischer, supra*.

The construction of this sidewalk separated by these retaining walls, the ends of which came together in such a way as to form a projecting angle, upon the opposite of which retaining wall was this ravine, formed a situation of an unusual character, and could in no sense be regarded as the usual or customary way of constructing sidewalks and retaining walls. The projection into the sidewalk was of just the character that would cause a pedestrian to stumble upon it, and in stumbling, would likely cause him to fall over the low retaining wall into the ravine. The court left it to the jury to determine whether this sidewalk, under the circumstances, was reasonably safe for pedestrians passing along it, and the jury by its verdict has found that it was not, and the court is not disposed to disturb the finding of the jury in that respect.

The general rule, which is the one governing this case, is stated and authorities collated in *Elliott on Roads and Streets* (3d Ed.), Sections 790, 792, 796 and 798.

At the trial, the plaintiff's father, who acted as her next friend in filing this action, took the witness stand and testified as to the condition of the sidewalk, retaining walls and ravine; and also testified as to the nature of the injuries which the plaintiff received by reason of falling over the retaining wall. On cross-examination he was shown a letter which he had written to the village council shortly after the accident. This letter is as follows:

"I hereby call your attention to the injury of my daughter, caused by a fall on the village sidewalk running north and south on First street in Addyston. At this point two retaining walls intersect, one projecting out past the other, making the passway at this point very hazardous.

I feel that this village is at fault for the cause of this accident, and I hereby make claim on your board for injury, suffering and expenses caused by this fall, to the amount of \$200.

This child is injured for life, and if your honorable body does not consider this bill a just bill, I will sue through the courts for recourse in this case."

The father admitted writing the letter, and the defendant offered it in evidence, to which objection was made by the plaintiff, and the court sustained the objection.

It is claimed that the court erred in this ruling. This question involves the law relating to the power of the parent and next friend to represent and make admissions binding upon the infant plaintiff. The rule on this subject is clearly stated in 14 Ruling Case Law, page 291, in this language:

“It is the general rule that the next friend or guardian *ad litem* of an infant can not bind him by any admissions, waivers, or stipulations, except as to such minor matters as are necessary to facilitate the progress of the suit, and do not affect the infant's substantial rights. * * * Nor can he dispense with the necessity of proving the substantial allegations against his ward by admissions in his pleadings.”

This text is supported by various cases, among others being, *White v. Joyce*, 158 U. S., 128.

In the case of *Buck v. Maddock*, 167 Ill., 219, at 221, the court on this subject said:

“It is said the trial court erred in refusing proof of admissions made by the mother of appellees, who was acting as their next friend in this suit. She is not a party to the suit in such a sense that her admissions or declarations out of court should be received. She was a witness, and if it was desired to prove that she made the supposed statements by way of impeachment, the proper foundation should have been laid by asking her whether she had so stated, fixing the time and place and persons present. This was not done. The point is not well taken.”

To the same effect is *Mississippi Central Railroad Company v. Pillows*, 58 So., 483.

The policy of the law of Ohio is indicated and the circumscribed authority of a next friend found in Section 11247 General Code, which we quote in part:

“ * * * When the action is brought by his next friend, the court may dismiss it, if it is not for the benefit of the infant, or substitute the guardian, or any person, as the next friend.”

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It is the opinion of the court that the witness, Mr. Baker, did not have authority, either in his capacity as father or next friend, to make any admissions binding upon the infant plaintiff. It is urged, however, that inasmuch as he was a witness in the case, that this letter should have been admitted in evidence, for the purpose of impeachment. In the opinion of the court, the letter was not admissible upon that theory for two reasons; first, because the letter has no tendency to impeach any testimony given by the witness—there being no contradiction between the testimony given by the witness and the letter; second, the only expression in the letter of any value to the defendant, was that in which the witness claimed \$200 from the defendant, but inasmuch as the witness, upon the same theory that the plaintiff had a claim, would also personally have a claim against the village, and inasmuch as the letter does not state whether he is making the claim on behalf of the plaintiff or on his own behalf, in order to allow the letter in that respect to be used as evidence against the plaintiff, the court would be obliged to assume that the letter was written on behalf of the plaintiff and that the amount claimed was in compensation for her injuries, as distinguished from the father's claim for loss of services, expenses, etc.

That facts not admissible in chief as a defense can not be introduced indirectly under the guise of impeaching questions on cross-examination, was decided in the case of *Luval v. Davey*, 32 Ohio St., 604, at 613. The rule in *Duval v. Davey* has more forcible application in this case for the reason that the letter offered had no tendency to impeach the testimony of the witness.

In the opinion of the court, no error prejudicial to the defendant was committed at the trial, and the motion for a new trial is therefore overruled.

**PROCEEDING BY ADMINISTRATOR TO SELL REAL ESTATE
TO PAY DEBTS.**

Common Pleas Court of Pike County.

**IN THE MATTER OF THE ESTATE OF DANIEL MARHOOVER,
DECEASED.***

Decided, January Term, 1919.

Estates of Decedents—Action Does Not Lie to Sell Real Estate to Pay Debts, When—Mortgage Indebtedness, Amply Secured, Not Basis for Proceeding to Sell, When.

1. It is not necessary to sell the real estate of a decedent to pay secured debts not presented to the administrator within twelve months from the time of his giving notice of his appointment, where the personal assets in the hands of the administrator are more than sufficient to pay all unsecured debts, allowance to the widow and children for year's support and costs of administration.
2. Section 10788, General Code, vests authority in the court where the petition is filed to refuse an order of sale of real estate to pay mortgage debt of the deceased, on petition of the administrator therefor, where the mortgagee answers that it is not necessary to sell the real estate to pay its debt secured by mortgage thereon, and that the mortgagee did not present its claim to the administrator for allowance and payment, and the guardian for minor defendants answers and denies that it is necessary to sell the real estate to pay the debts of the deceased as alleged in the petition, and where it appears to the court upon the hearing that the heirs of the deceased have a considerable interest in the real estate mortgaged over and above the mortgage debt.

*J. S. S. Riley, Newby & Smith, for plaintiffs.
Dougherty & Moore, contra.*

DILL, J.

Earl D. Parker, administrator of the estate of Daniel W. Marhoover, deceased, filed his petition in the common pleas court in

* Affirmed by the Court of Appeals by decision rendered April 18, 1919.

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Estate of Marhooover, Deceased.

regular form asking for the sale of the real estate owned by the deceased for the payment of debts, making all the heirs of the deceased party defendants together with the Waverly Building & Loan Company, the petition states that the administrator had converted all personal property into money which amounted to the sum of \$4,347 being wholly insufficient to pay the debts and costs of administration, and contained a schedule of the debts, which included a mortgage debt to the Waverly Building & Loan Company for the sum of \$4,500, and described the real estate. The Waverly Building & Loan Company answered the petition in substance as follows, that the personal assets in the hands of the plaintiff administrator are more than sufficient to pay all unsecured debts, and that it is not necessary to sell said real estate to pay any debt or claim secured by mortgage thereon, and for that reason it did not present its mortgage claim to said administrator for allowance and payment. The guardian of the minor defendants answered in substance that said minors by said guardian deny that it is necessary to sell said real estate to pay the debts of said decedent as alleged in the petition, but aver that the personal estate of the said deceased now in the hands of said administrator are amply sufficient to pay all unsecured debts of said decedent, and that it is not necessary to sell said real estate to pay said mortgage claim. The court upon the hearing of the case found the facts to be as follows, to-wit: That the decedent died seized and possessed of the real estate described in the petition and an estate in personalty; that said plaintiff administrator has converted all the personalty into money, the amount thereof being \$3,347 and that the valid debts of said decedent amounts to the sum of \$7,320 about \$4,500 of which indebtedness is secured by mortgage to the defendant, The Waverly Building & Loan Company, on the premises described in the petition herein; that said administrator gave notice of his appointment by publication, and more than a year has elapsed since giving of said notice without the presentation of said mortgage claim for allowance and payment; that all unsecured claims against said decedent estate have been paid in full from the per-

sonal estate of said decedent, and that there are about \$1,500 available from the same source for the payment on said mortgage or for other purposes of said estate; that the heirs of the decedent have a considerable interest in the real estate in the petition described over and above the mortgage debt; that said building & loan company is not asking for a foreclosure or sale of said mortgaged premises.

The court finds and states as its conclusion of law from the foregoing facts that it is not necessary for the sale by the administrator plaintiff of the said real estate described in the petition to pay said mortgage indebtedness, for the reason that the same is amply sufficient in value to secure said mortgage indebtedness, and that the heirs have a considerable interest in said real estate over and above said mortgage debt. It is therefore ordered adjudged and decreed by the court that the petition of plaintiff be and the same hereby is dismissed at the costs of the plaintiff, and it is considered that said defendants recover of the said plaintiff as administrator aforesaid their costs herein expended to be levied upon the goods in his hands administered.

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Millersburg v. Wardack, Trustee, et al.

**VALIDITY OF CONTRACT FOR PUMPING WATER SUPPLY
FOR VILLAGE.**

Court of Common Pleas of Holmes County.

**THE INCORPORATED VILLAGE OF MILLERSBURG v. H. WURDACK,
TRUSTEE, ET AL.**

Decided, May 20, 1919.

Municipal Contracts—Where for an Amount Above the Statutory Limit and Not Authorized by Ordinance—Contract not Severable—Where Covering a Period of Years but Payable Monthly—Compensation to an Electrical Company for Pumping Village Water Supply—Not a Purchase of Supplies nor the Fixing of Compensation for Persons Employed—Specific Performance—Estoppel—Authority to Make Contracts Considered in Relation to the Conditions under which They are Made.

In the absence of an ordinance authorizing such a contract, the board of trustees of public affairs of a village are without authority to enter into a contract with an electrical company to pump the village water supply for a period of ten years for the consideration of \$2,400 a year payable monthly, and injunction does not lie for the enforcement of such a contract.

Newton Stillwell and City Solicitor, for plaintiff.

George W. Sharp and — Carey, contra.

KINKEAD, J. (sitting by designation of Chief Justice.)

This action was brought to restrain defendants from discontinuing the performance of a contract, and from failing and refusing to pump water for plaintiff, and for mandatory and perpetual injunction requiring defendants to specifically perform the terms of the contract. General Code, Section 4312.

Defendant Wurdack owns and operates the Millersburg Electric Light plant which furnishes electric light and current for the village and citizens thereof.

Plaintiff alleges that it made a written contract with the Citizens Light & Power Company on September 9, 1914, to pump

and promptly furnish a continuous supply of water for the village and citizens thereof from wells owned by the village to its reservoir for a period of ten years. The consideration was \$2,400 per annum, payable in equal monthly installments.

Provision was made that if additional hydrants should be placed in service, the same was to be paid for by plaintiff proportionately to the number of years. If the water supply should be decreased, then the price was to be proportionately decreased.

The village was to furnish and place all hydrants, taps, mains and pipes and to keep them in repair. It was to furnish all pumps, motors, transformers and other equipment necessary to perform the service under the contract, the company being required to keep the pumping station and premises in repair, natural wear and tear excepted.

The compensation paid the company for pumping was to be in lieu of and take the place of all expenditures which the board of trustees of public affairs might make for persons employed, or for fuel and other incidental running expenses.

The petition avers that through "mistake or inadvertence of the scrivener of said contract, or through the mutual mistake of both parties the same was executed in the name of the board of public service, in place of the name of the board of trustees of public affairs, etc."

As a matter of fact, however, the contract was signed by the acting and qualified president of the then existing board of trustees of public affairs, and was duly approved and confirmed by the members of such board.

The parties have continuously acted upon such contract, and fully performed its terms since it was made.

The cause of the complaint is that defendant gave notice to plaintiff that it would discontinue performance of the contract on March 16, 1919.

Plaintiff relying upon the contract, alleges it made no provision for the emergency of such discontinuance; it alleges that it has made contracts with various persons and corporations to furnish large quantities of water daily for customers and consumers, and that it has no other means of guarding against fires, etc.

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The defense is that on September 9, 1914, the Citizens Light & Power Company signed a certain instrument containing among other provisions the matters set forth in the petition, but claims that the same was and is null and void, and imposed no obligation upon the company, and that the answering defendant is not bound by its provisions; that the instrument is wholly void.

In reply plaintiff pleads estoppel; it is alleged that the light company and defendant trustee have operated under such contract; that the light company induced plaintiff to enter into the contract; that it declared and represented that unless the village of Millersburg entered into the contract it would be deprived of electric current during the hours of daylight.

The electric company presented monthly bills which were paid. Furthermore claim is made that the contract was written and prepared by the electric light company and presented by it to plaintiff and duly executed by both parties.

Therefore, it is claimed that defendant is estopped from asserting the invalidity of the contract.

The contention of illegality is made under Section 4328. This provision provides that the director of public service may make contracts or purchases for supplies or material, or provide labor for any work under the supervision of that department not involving more than \$500. If an expenditure within the department—other than compensation of persons employed—exceeds \$500, such expenditure must first be authorized and directed by ordinance of Council. In such case it is imperative that the director of public service make a written contract with the lowest and best bidder after advertisement, etc.

This provision has application to municipalities having directors of public service; it has relation to expenditures for supplies or labor for any work under the supervision of that department; it has no reference to compensation of persons employed in the department.

There is no director of public service for villages; Sections 4356 to 4362 create the board of trustees of public affairs for villages.

Section 4361 confers upon the board of trustees of public affairs all the powers requiring it to perform all the duties re-

quired to be exercised and performed by the trustees of water works.

Section 4361 was amended May 9, 1913 (103 O. L., 561). This amendment provided that:

“The board of trustees of public affairs shall manage, conduct and control the water works, etc. * * * Furnish supplies of water * * * appoint officers, employes and agents. * * * The board of trustees of public affairs shall have the same powers and perform the same duties as are possessed by, and are incumbent upon, the director of public service as provided in Sections 3955 and 4328 of the General Code, etc.”

It is clear Section 4328 of the General Code is applicable to boards of trustees of public affairs in villages; that contracts *for supplies, material or provision for labor for any work under the supervision of that department not involving more than five hundred dollars, can not be made except in the manner therein provided.*

Contracts for the purchase of supplies or material in excess of \$500 can be made only upon authority of council after advertisement and receipt of bids.

The board of trustees of public affairs for villages may “provide labor for any work under the supervision of that department not in excess of \$500 without an ordinance, advertisement or bids.

What does “provide labor for any work” mean? Does it have application to a contract with an electric company to furnish power to operate the pumps of municipal water works? The electric company undertook the work of pumping water for a period of ten years at \$200 per month or \$2,400 for one year, for a total period of ten years.

The language of the contract is that the company “agrees to properly pump and properly furnish the continuous supply of water at and from the wells of the village.” The company agreed “to furnish place and maintain all pumps, motors, transformers and all other equipment necessary to perform properly the service under the contract.”

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It was contemplated that the company was to furnish "supplies or material." Defendants were to *supply* all pumps, motors, transformers, and all other necessary equipment to do the pumping. Is electricity or the power generated thereby and transmitted by the essential equipment to be regarded as supplies?

The logical conception is that the electric company undertook to furnish and sell all the electricity or power and the means of transmission thereof essential to do the work of pumping the water for plaintiff.

What the electric company contracted to do took the place of the coal and the engineer the means by which the work of pumping had formerly been done by the village.

That which the electric company agreed to furnish, to-wit, electric power and the necessary "supplies or material" for transmission thereof, bears no analogy to the exception of Section 4328, viz.: "the compensation of persons employed therein." Furnishing electricity at \$200 per month is not compensation of persons employed, but is purchasing electric power as supplies at \$200 per month.

All users of electricity buy and pay for so many watts or units of power consumed by them; it is analogous to so many tons of coal used to operate the pumps.

In this case the electric company agreed to furnish such number of watts of power as were essential to do the work of pumping the water for plaintiff at the rate of \$200 per month or \$2,400 per year.

It is held that electricity furnished to illuminate a mine constitutes "materials or supplies" under a statute providing for a lien for furnishing the same. A supply means any substance consumed; in its more generic sense it means anything furnished to meet a need; the term "supplies" as used in the statute, includes any substance the use of which reasonably tends to the work or operation of a mine. *Grant's Pass Trust Co. v. Enterprise Mine Co.*, 113 Pac., 859, 34 L. R. A. N. S., 395.

" 'Supplies' is frequently used in statutes relating to liens, and as used in reference to a city or its inhabitants." *Gleason v. Dalton*, 51 N. Y. Supp., 337, 338, 28 App. Div., 35, 555.

The contract was not executed in conformity to law. The material or fatal irregularity is the lack of a municipal ordinance authorizing the board of public affairs to enter into the contract. It is sufficient for purposes of this decision to hold that an ordinance was essential; this authority was necessary; in the absence of an ordinance the board of trustees had no authority to make the contract for the reason that the expenditure to be made exceeded the statutory limit. The informality in the name of the official authority is not of official consequence. Nor is it essential to decide that failure to advertise and receive bids invalidated the contract. The authorities cited on this proposition tend to support the contention that advertisement and receipt of bids may not be essential where conditions are such that there might not be competitive bids; where there is a monopoly or but one company.

In *City v. Electric Co.*, 65 Conn., 324 (1895), it was held that the fact that the contracts were not advertised according to a city ordinance, requiring all contracts for city work exceeding in amount \$500, and the contract awarded to the lowest bidder could not be held void when it appeared that the electric light company was the only company which could without delay furnish electricity to the city. This was a contract for lighting the street lights.

The lighting of public buildings and streets with gas under an act requiring contracts for supplies to be made on advertisement for sealed proposals was held not to be within such act, where the company had a practical legislative monopoly. *Harlem Gas Light Co., v. City*, 33 N. Y., 309 (1865).

It was stated in *Baird v. City*, 96 N. Y., 566, 582, 1884, that—

“it has been frequently held that provisions of law requiring contracts on behalf of a municipal corporation to be let to the lowest bidder may not be obligatory upon its officers on account of their inherent inapplicability to the nature and circumstances of the case. If an article can be obtained from one person alone it would not only be farcical, but also a hazardous proceeding to subject the city to the obligation of making a contract at the lowest price offered, when there was but one person who could lawfully bid for the privilege of sale; such a construction might

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compel a contract for a price dependent upon the arbitrary will and caprice of one only of the parties.”

The making of such contracts after advertisement and receipt of competitive bids, to the lowest bidder, has relation to the conditions upon which the same may be made.

There is a clear distinction between the power or authority of officials to make contracts and the conditions upon which they may be made.

Let us assume that in view of the fact that this contract could not have been made with any other party but defendant, it might nevertheless be considered as valid: Can it be sustained and upheld upon other grounds? The court is of the opinion that it can not. The board of trustees of public affairs could not make such contract without first obtaining an ordinance authorizing it to do so.

It is claimed that the contract was not within the \$500 limitation of the statute, because it was severable; that it was an obligation for \$200 monthly payments.

The contract is to be regarded as an entirety, not as separable as contended by plaintiff. It was not merely for one month; it was made on a yearly basis for \$2,400 payable \$200 per month. The basis of payment was specifically made on a yearly basis, with payments to be made monthly. The character and nature of the subject matter of the contract shows it to be an entirety.

It is contended that as Section 4361 (amended in 103 O. L., 561) conferring upon the board of trustees of public affairs of villages the same powers and imposing the same duties as are conferred upon the director of public service in cities under Section 3961, that this section (3961) authorized the director of public service to make contracts *for all other purposes* necessary to the full and efficient *management and construction* of water works.

It is contended that this provision gave the board of trustees of public affairs authority to make the contract in question, and that it was entered into for the efficient management and the pumping of water within the purview of this section; that the conduct and control of the water works as a municipal institu-

tion is entirely in their hands, the council having no say in the matter.

Such general power of management can not be effective as against such specific limitations as are found in Section 4361, so as to authorize the board of trustees to make a contract without complying with the provisions.

It must be concluded that the contract was executed without legal authority.

The statute confers authority upon the solicitor of the village to maintain a suit in injunction as in specific performance. To successfully prosecute such action there must be a clear legal or equitable right. If our construction of the statute be correct plaintiff has no foundation for relief except by claiming that defendant is estopped from asserting the illegality of the contract.

The authorities cited on the question of advertisement have been examined; they tend to support the argument of the solicitor. But this point is not considered as vital for the reason that the conclusion of the court is based upon the want of authority of the board of public affairs to make the contract without authority given by a municipal ordinance.

The requirement of the statute that an ordinance shall be passed conferring authority to make a contract for supplies when the amount exceeds \$500 is mandatory and can not be avoided. The rate of the \$200 per month was fixed regardless of the number of watts that might be used.

We have considered carefully the theory that the \$200 per month agreed to be paid the company might be considered as compensation of persons employed by plaintiff. A corporation may be classed as a person under some statutes, but it seems that the language of this statute contemplated compensation of persons employed for any work under supervision of the service department. Furnishing motor pumps and power by electricity does not seem to be within the purview of provision for labor or compensation of persons to do labor or any work.

The conclusion is that the plaintiff can not maintain this action for specific performance for the reason that the council of the village of Millersburg did not authorize and direct the board

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of trustees of public affairs to make the contract. To base the remedy of specific performance upon an estoppel would be a novelty.

The statutes authorize a solicitor or village or city attorney to maintain a suit in the nature of specific performance. From the very nature of contracts made with municipalities this class of equitable remedies is bound to be unlike those found in the usual and ordinary classes. In some general aspects there are elements analogous to ordinary remedies between individuals, viz.; the doing of complete justice; inadequacy of damages; where damages are impracticable.

The granting of the remedy by specific performance is discretionary—not an arbitrary or capricious discretion—but rests upon a sound judicial discretion, controlled by established principles of equity, and exercised upon a consideration of all the circumstances of the case. But it is a universal and fundamental principle of equity that contracts to be enforceable in equity must be free from mistake or illegality. Pomeroy, Section 1405.

This contract is not free from illegality; the only ground for *enforcibility* would be that the defendant would be estopped from denying the informality and illegality. Estoppel furnishes the basis for defense, and not for affirmative relief.

Compensation of persons employed—the language of the exception in Section 4328—may be claimed to have application to the employment of the electric company to do the pumping so as to furnish a continuous supply of water for the village.

A corporation may for certain purposes be classed as a person; but the primary intent and purpose of the language of Section 4328 was not to apply to such an artificial person as the electric company, because the paramount and only purpose was to have the company furnish the power to do the pumping so as to dispense with coal and an engineer.

We have carefully considered every angle of the case with a view to sustaining the contract. It is the natural desire to sustain a contract such as this one. A common expression is: A contract is a contract. It does not appeal to one's sense of justice to permit a breach of a written undertaking such as this one.

But the power to make such contracts as this is statutory, and a valid one can be made only in the manner provided by statute.

The question of estoppel is presented under peculiar conditions. The statute authorizes the municipality to maintain an action in the nature of specific performance; it is equitable in nature, and unquestionably is to be founded upon equitable principles. Plaintiff is in the unfortunate position of not having followed the law, and bases its claims for relief only upon the ground that defendant having induced the contract, and having carried out and received its benefits as long as it was profitable and beneficial should not be permitted to abandon the same when it is not so profitable after conditions have changed.

But the action is equitable in nature, and the want of equity is present on the part of both parties; to maintain an action equitable in nature the plaintiff's cause must be founded upon strict legal right. The plaintiff not having made the contract in strict accord with its statutory right and power, its cause lacks the equitable right essential to enable it to seek equity.

A court of equity can do nothing more therefore than to leave the parties in the position in which it finds them.

The conclusion is that plaintiff is not entitled to maintain this action.

The finding, judgment, and decree is against plaintiff and in favor of defendant. An order may accordingly be entered. Exceptions may be noted in entry.

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Ross v. Poor.

**AS TO GROUND FOR ATTACHMENT AGAINST A
NON-RESIDENT.**

Common Pleas Court of Hamilton County.

FLORENCE A. ROSS V. AMELIA MAY POOR.

Decided, January Term, 1919.

*Attachment—Where against a Non Resident and Based on Contract—
The Allegations Must Afford more than a Possible Inference of a
Quasi Contract.*

An action for recovery of money, which it is alleged the defendant through a breach of duty converted to her own use, is not an action on a contract in the absence of an allegation that the said duty arose by reason of a contract, and attachment can not be based in such a case on the non-residence of the defendant.

Fyffe Chambers, for the motion.

C. A. J. Walker, contra.

GEOGHEGAN, J.

Heard on motion to discharge an attachment.

The plaintiff filed her action herein against the defendant, alleging that she was the owner and entitled to the immediate possession of diamonds of the value of \$2,500, which she claimed the defendant took and carried away and unlawfully converted and disposed of to her own use, to plaintiff's damage in the sum of \$2,500. For a second cause of action she alleged as follows:

"On the ——— day of April, 1918, plaintiff was entitled to the payment to her of one-half of the proceeds of a life insurance policy No. 7253, with The Modern Woodmen of America, for the sum of two thousand (\$2,000) dollars, in the life of Irby Woodson Poor (also known as Woodson Poor), deceased. On said date the defendant collected and appropriated the portion of the said sum coming to this plaintiff, to-wit, the sum of one thousand (\$1,000) dollars, to her own use, to the damage of the plaintiff in the sum of one thousand (\$1,000) dollars."

Her prayer was for judgment against the defendant in the sum of \$3,500.

Accompanying this petition, the plaintiff filed an affidavit in attachment, by her attorney, alleging, among other things, that the defendant is a non-resident of the state and that Fred E. Wesselmann, clerk of the court, had money in his hands belonging to the defendant.

The defendant entered a special appearance and moved that the attachment be discharged:

1. On the ground that said petition and affidavit do not constitute a ground of attachment as set forth in Section 11819 of the General Code of the state of Ohio; and,

2. On the ground that the defendant is a resident of the city of Cincinnati, county of Hamilton, and state of Ohio.

In support of the first ground, counsel for defendant contends that the action sued upon herein is not based on "a debt or demand arising upon contract, judgment or decree," and that therefore the plaintiff is not entitled to an attachment under Section 11819 of the General Code.

I think he is correct in this contention.

Counsel for the plaintiff, in oral argument, conceded that the first cause of action was one for conversion and therefore sounded in tort, and an attachment could not be sustained under it upon the ground of the non-residence of the defendant. He claimed, however, as to the second cause of action, that it arose out of contract, inasmuch as it was a claim for a definite sum of money, for the repayment of which an implied obligation rested upon the defendant, that is, in effect, that it was the action of *indebitatus assumpsit* at common law. He relies principally on the case of *Martin v. Gunnison et al*, 1 C.C.(N.S.), 71.

But that case is clearly distinguishable from the case at bar. The petition in that case averred that one Howe was made the trustee of one hundred shares of stock for the use of plaintiff's mother during her life, and that after her death it was to be divided between the children; that the defendant had been appointed trustee in succession to Howe, had taken possession of

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said shares of stock and had converted both the interest, which had been collected, and the said stock to his own use, and she asked judgment against the defendant for one-half the value of said stock and said interest, having alleged that she and her sister were the only children surviving her mother. It is evident, from an examination of this petition which was demurred to, how the circuit court came to the conclusion that the cause of action stated in the petition arose out of contract. The defendant, when he accepted the trust, became a bailee of the stock for certain purposes. Under his contract of bailment he obligated himself to pay over the proceeds of the stock to plaintiff's mother during her lifetime and at her death to turn over the stock to the plaintiff and her sister, who were the only surviving children of the mother. Therefore, the action was for his failure to perform this contract, as plainly set forth in the petition, and the court might well say that the action sued upon therein was one arising out of contract and therefore within the purview of Section 11819 of the General Code.

However, an examination of the second cause of action in this petition does not disclose in what manner the defendant herein secured the proceeds of the policy of insurance, and for all that appears on the face of the petition there is no inference that she entered into any contract whereby she agreed to turn the proceeds over to the plaintiff herein, but it is plain that the allegation is that she converted same to her own use.

It seems to me that the second cause of action alleged in the petition comes squarely within the decision of the Supreme Court of Ohio in the case of *Pope v. Insurance Company*, 24 Ohio St., 481, wherein the cause of action was based on an alleged failure to insure certain property which was destroyed by fire while in the hands of the defendant. The court, in passing upon Section 191 of the Civil Code, now Section 11819 of the General Code, as applicable to the petition filed in that case, say at page 485:

“The cause of action alleged in the petition and affidavit for an attachment * * * was not one ‘arising upon contract, judgment or decree,’ but was based solely on a breach of duty, without averring that the duty arose by contract.”

The second cause of action herein does not aver anything with reference to how the proceeds of this policy came into the hands of the defendant, and certainly does not aver that any contract was entered into whereby the defendant was to pay to the plaintiff these proceeds or any part thereof. It is evident, from the construction put upon what is now Section 11819, General Code, by the Supreme Court, in the case of *Pope v. Insurance Company, supra*, that some averment must be made in the petition from which the court may at least infer that the cause of action arose out of some contract, either express or implied. The most that can be said for the second cause of action herein is that a *quasi* contract may be inferred, and this, I think, is not what the statute contemplates.

I therefore think that the motion to discharge the attachment should be granted.

I have made a careful examination of all the authorities submitted by counsel upon this phase of the matter under consideration, and have come to this conclusion after mature reflection.

The most important case cited by counsel for plaintiff is the case of *Railroad Company v. Peoples*, 31 Ohio St., 537. But that case is also distinguishable from the case at bar, inasmuch as the petition therein recited a contract of carriage between a common carrier and a passenger and relied upon the failure of the carrier to carry safely, thus causing an injury to the passenger, and the court held that the passenger, in an action to recover for the failure to carry safely, might, at her election, sue upon the contract or in tort and that an attachment therefore might be sustained as upon a demand arising out of contract.

Having taken this view, it is not necessary for me to pass upon the other questions presented, to-wit, the place of residence of the defendant and the sufficiency of the affidavit.

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Leslie v. Norwood.

INTEREST ON DEFERRED ASSESSMENTS.

Common Pleas Court of Hamilton County.

ELLA E. LESLIE ET AL V. CITY OF NORWOOD ET AL.

Decided, May 9, 1919.

Assessments—For Street Improvements—Date from which Interest Should be Calculated on Deferred Payments.

Where an assessment for a street improvement is made payable in annual installments, interest runs from the date of the passage of the assessing ordinance.

Joseph T. Harrison, for plaintiffs.

O. F. Dwyer, for defendants.

DIXON, J.

This cause is heard on two motions, one filed by the plaintiff, Ella E. Leslie, to require the auditor of the city of Norwood to show cause why he should not be punished for contempt, and the other by the defendant, City of Norwood, to modify or supplement the decree heretofore entered herein. The decree was entered on February 1, 1919, and both motions were filed during the January term of this court.

The plaintiff, Ella E. Leslie, and others, brought this action to enjoin the city of Norwood from collecting certain street assessments claimed to be illegal and upon a hearing and subsequent rehearing of the case on its merits the trial court made an order resulting in a slight reduction in the cost per front foot of the assessment as levied and entered up a final decree, which contains the following paragraph:

“It is further ordered that each of said plaintiffs shall have the privilege, within thirty days of the entry hereof, to pay their said several assessments so reduced as aforesaid in cash; otherwise with five per cent. interest and in ten annual installments for said sum so found due; and that the defendant, the City of Norwood, pay the costs of this action.”

From this recital it is apparent that the exact date from which interest begins to run on the deferred annual installments is not fixed with any degree of definiteness.

The plaintiff, Ella E. Leslie, claims that interest is chargeable only from February 1, 1919, the date of the decree, and upon this basis she has calculated the amount of the current annual installment of her proportion of the assessment and has tendered the same to the city auditor of Norwood, who has refused said payment. Hence, the contempt motion.

On the other hand, the City of Norwood claims that interest is chargeable on the deferred annual installments of said assessment from the date of the passage of the assessing ordinance, which was May 21, 1917.

Which of these contentions is correct?

The question raised here is not a new one in Ohio, and while the authorities are not in entire harmony, nevertheless, in the only reported case that has reached our Supreme Court the right of a municipality to charge and collect interest from the time fixed by the ordinance for the payment of the assessment is specifically recognized in actions involving the validity of such assessments. *Gest v. Cincinnati et al*, 26 Ohio St., 275. See also *Fricke v. Cincinnati*, 1 O. N. P., 98.

A supplemental order, therefore, may be taken, fixing May 21, 1917, as the time from which interest is to be calculated on the deferred annual installments of said assessment.

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State v. Bandy.

MURDER IN THE COMMISSION OF ROBBERY.

Common Pleas Court of Franklin County.

THE STATE OF OHIO V. HENDERSON BANDY.

Decided, April Term, 1919.

*Charge of First Degree Murder Does Not Include Lesser Degrees, When
—Instruction Should be Given on Lesser Degree of Crime Charged
when Evidence Tends to Prove.*

1. A charge of murder in the first degree while perpetrating a robbery, by the use of a deadly weapon which inflicts a mortal wound proximately causing death, does not embrace second degree murder or manslaughter.
2. Where an indictment charges a defendant with purposely killing another while perpetrating robbery upon him, no other class of homicide being charged, and the evidence *tending* to prove no other grade of the crime, no instruction should be given the jury concerning murder in the second degree, or manslaughter, nor should verdicts therefor be submitted to the jury.
3. An indictment for murder in the first degree, while embracing assault and battery as an essential incidental ingredient of the homicide, does not in fact include and charge therein simple assault, or assault and battery as separate crimes upon which the accused may be tried or convicted where the evidence tends only to show guilt of homicide, and does not tend to prove mere assault or assault and battery. Assault and battery can be charged as a separate crime only where the person assaulted survives the same.
4. Urging a jury to make reasonable effort to agree upon a verdict in a criminal case because of the additional expense to the county upon a second trial, and for the reason also that a final decision and end of the case was of equally vital concern and consequence to the accused, does not tend to coerce the jury or prejudice the accused since the instruction is impartial between the parties.

Hugo N. Schlesinger, Prosecuting Attorney, *Ray O'Donnell*,
and *Charles G. Saffin*, Assistants.

John H. Coper and *Matthew L. Bigger*, Contra.

KINKEAD, J.

Defendant was convicted of murder in the first degree, with recommendation of mercy. The case is submitted on motion for new trial.

The indictment charged that defendant killed Homer R. Day, a taxi-cab driver while engaged in committing robbery upon him. It makes no other charge. It did not charge deliberate and premeditated killing. It charged that defendant and John Doe assaulted Day, and by violence and by putting him in fear took from him, money, a watch and other articles all of the value of \$90.00; that while in the act of robbing him, they—defendant and John Doe (the other person was unknown and not apprehended) shot and killed Day with a revolver.

The indictment did not charge any other *class* of homicide; it did not charge any other of any other elements of any other kind of first degree murder; it did not charge deliberate and premeditated malicious killing. It set forth the manner of killing and closed with the allegation “in the manner and by the means aforesaid, unlawfully, purposely, and while perpetrating a robbery, defendant did kill and murder.”

The undisputed evidence shows that two persons who rode from Chillicothe to Columbus with Day in his taxicab, robbed and killed him, threw him out of the machine and drove off. Evidence of the dying declaration of deceased made under sense of impending death disclosed and fully proved the robbery and the shooting of him with a revolver. He died within a short time after the shooting. Evidence of witnesses tended to prove that defendant was in Chillicothe on the 10th of February, 1919, the day of the murder; that he made inquiry of persons concerning a taxicab for Columbus, and that he was referred to Day. Evidence was given of a declaration that he was one of the men who committed the deed. The defense was an alibi, proof being introduced by the time-keeper of the factory, whose recollection was refreshed by reference to his time book, which book, however, did not show the dates without the explanation of the time-keeper as to his method of keeping it. The evidence was largely what is commonly called circumstan-

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tial evidence, it not being essential to further set it forth. Several witnesses identified defendant as the man in Chillicothe arranging for a taxicab.

It is sufficient to state that all the evidence tended to prove guilt of murder while committing robbery; that there was *no evidence*—not a scintilla—*tending to show* any other crime. The evidence showed the commission of robbery; that act under the statute, however, is a mere constituent element of murder purposely committed when perpetrating robbery: when death results from the discharge of a bullet in committing the robbery, the act of robbery is merged and becomes a mere part of the crime of murder.

The paramount question arises upon the instruction to the jury concerning the crime charged, and the duty of the jury in the rendition of its verdict. After charging the jury upon the preliminary matters usually contained in an instruction in a criminal case—such as presumption of innocence, burden of proof, credibility of witnesses, etc., the charge upon the law applicable to this kind of first degree murder, *upon the evidence*, and the duty of the jury in rendering its verdict was brief and was as follows:

“Statute 1240 defining this crime is as follows: ‘Whoever * * * in perpetrating or in attempting to perpetrate robbery kills another is guilty of murder in the first degree.’ In a homicide such as is charged in this case, that is, one committed in the perpetration of robbery, the enormity and turpitude of the criminal act in which the person charged was engaged at the time of the killing, supplies the place of the deliberate and **premeditated malice**, which is the element of first degree murder where the offender purposely and with deliberate and premeditated malice kills another. (8 O. S. 131; 69 O. S. 215.) Therefore, in this case, it is not necessary to prove deliberation and premeditation. (69 O. S. 215; 42 O. S. 150; 5 C. C. 496.) All that is required is that it shall be made to appear that defendant purposely killed the deceased Day while engaged in the act of robbing him. Intent and purpose to kill, however, is essential. To purposely kill another is to intentionally kill. It must appear that defendant purposely and intentionally killed Day while committing the crime of robbery. The law,

however, regards all persons who have arrived at years of discretion as rational beings, capable of reasoning from cause and effect. Every person possessed of the faculty of reason is presumed to contemplate and intend the natural and probable consequences of his acts. If a person inflicts a mortal wound upon another in a manner purposely calculated to destroy life, an inference may be drawn therefrom by the jury that the person using a revolver and discharging a leaden bullet therefrom into the body of another intended to kill the person. This is for the jury to determine as a fact; that is whether intent to kill may be inferred from the use of a deadly weapon."

The above constitutes all that was stated to the jury in reference to the definition of this grade or class of homicide.

The jury was also instructed in respect to the crime of robbery, which constituted an incidental essential element of this grade of homicide, and then was charged as follows:

"The court now instructs the jury concerning its duty in arriving at its verdict. Every act of murder while in the commission of a robbery involves an assault and battery upon the victim. It also involves the crime of robbery. Before a verdict of murder in the first degree may be found, the jury must find that the defendant was engaged in robbing the deceased, at the time such murder was committed. Where, however, the evidence shows that the act of shooting a leaden bullet into the body of the person by one engaged in robbing him results in death, the verdict by the jury can only be one either of guilty or not guilty of the crime of murder in the first degree. Accordingly the court submits to the jury three forms of verdict, one guilty as defendant stands charged, another, not guilty, and the third, guilty as charged, but with the recommendation of mercy. The statute provides that when the jury finds one guilty of murder in the first degree while in the act of committing robbery, he shall be punished by death unless the jury trying the accused recommend mercy, in which case the punishment shall be imprisonment in the penitentiary for life."

The chief error claimed is that the court should have charged the jury concerning the several degrees of general homicide and have submitted verdicts therefor.

Section 12400 defining the classes of first degree murder has remained in substance the same as when first enacted, except

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as to murder by poison. Murder at common law was repealed in 1815, and was then divided into two degrees (2 Chase's St., 857). The statute then read:

"If any person *shall purposely of deliberate* and premeditated malice, or in the perpetration or attempting to perpetrate any rape, robbery, or burglary, kill another, every such person shall be deemed guilty of murder in the first degree, etc."

In 1835 the statute was slightly changed.

It was finally changed to its present form, viz.:

"Whoever, purposely, and either (1) of deliberate and premeditated malice, or (2) by means of poison, or (3) in perpetrating or attempting to perpetrate rape, arson, robbery or burglary, kills another is guilty of murder in the first degree."

The construction given the statute in early years by Bartley, J., has been regarded as the correct one, viz.:

"This section is composed of one compound sentence, and is descriptive of *three classes* of homicide, towit: *First*, that which is committed of deliberate and premeditated malice: *Second*, that committed while in the perpetration, or attempt to perpetrate a rape, arson, robbery, or burglary; and, third, that committed by administering poison, etc."

In the present statute murder by poison is the second class, and murder in perpetration of the felonies the third class.

The three general classes of first degree murder are defined by Section 12400; second degree by Section 12403, and manslaughter by Section 12404, and are:

(1) The killing of another purposely, and with deliberate and premeditated malice is first degree murder.

(2) The killing of another purposely by means of poison is first degree; and

(3) The killing of another purposely while perpetrating or attempting to perpetrate rape, arson, robbery, or burglary, is first degree murder.

(4) The killing of another purposely and maliciously is second degree, made so by a separate statute.

(5) Unlawful killing another without intent, without deliberate and premeditated malice, without malice upon adequate provocation or while engaged in the commission of an act made unlawful by statute, is manslaughter.

(6) The killing of another *purposely*, but without deliberate and premeditated malice, by the use of a deadly weapon such as a revolver causing a mortal wound is murder in the *second degree*.

(7) But shooting another when engaged in robbing him, death resulting from a mortal wound caused by a leaden bullet fired from a gun, cannot be mere second degree murder, because the slayer both robbed and killed the victim by the same act or transaction.

(8) When the robbery is committed and the person is killed by the robber by a shot fired from a revolver at one and the same time and act, how absurd would it be to instruct the jury that an indictment for such grade of first degree embraces second degree murder, manslaughter, simple assault, assault and battery, when that is neither a true statement of fact or sound law.

The time honored customary fiction and practice that such crime embraces a lesser degree is a cloud upon the administration of the law.

As stated in the opinion in *State v. Menhinney*, 43 Utah, 135:

“Why submit a question to the jury upon which an affirmative finding can in no event be justified? Is not the question of whether there is any evidence in support of any essential fact as much a question of law in a homicide as any other? The court should not in its instructions authorize and in a sense invite the jury to violate their oath and bring about a miscarriage of justice.”

Section 13692 originally read as follows:

“*That in all trials for murder, the jury, before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict, whether it be murder in the first or second degree, or manslaughter.*” (1 S. & C. 416.)

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This was the language when *Robbins v. State*, 8 O. S. 131, was decided: “*That in all trials of murder*” of course applied to no other kind of crime; “shall ascertain whether it be murder in the first or second degree, or manslaughter,” is not mandatory upon court and jury because of the use of the word “shall,” regardless of the state of the evidence. The statute originally applied to murder trials only. The present statute applies to all crimes where the indictment charges an offense including different degrees, and was corrected and amended either to change its meaning or to make its intent clear, viz.:

“When the indictment charges an offense including different degrees, the jury *may* find the defendant not guilty of the degree and guilty of an inferior degree thereof.”

Judge McIlvaine in *Morehead v. State*, 34 O. S. 212 stated that it was intended to define the “*power of the jury and not to control the form of verdict.*” This is significant language: It was to confer power to render a verdict according to the evidence and the law. Criminal law as well as procedure being purely statutory, courts deriving no power under the common law, it was essential that the power of jury and court as well as the mode of procedure should be specifically prescribed by statute.

The amendment of the statute eliminating the words “That in all trials for murder” and practically enacting a new provision extending the principles to all classes of crimes where the charge in the indictment embraces lower degrees thereof, and giving the power to the jury to find the accused guilty of the lesser degrees was a radical change in the statute.

The language of the old section “That in all trials for murder,” the jury *shall* ascertain in their verdict, etc., was construed by earlier decisions as conferring unrestricted power upon juries to find the degree of murder.

For instance, in *Dick v. State*, 3 O. S. 89, a verdict of guilty as he stands charged in the indictment was held to be an error for the reason that “a verdict ‘of guilty in manner and form as he stands charged in said indictment’ was insufficient”

and that "the verdict (did) not ascertain the degree of the crime as required by law." The charge in the indictment was first degree murder; that included the lesser degrees, and the statute designed that the jury should ascertain and determine the fact—i. e., the degree of guilt. This was the reasoning of the majority opinion. The judgment was reversed because the verdict was considered uncertain; "guilty as he stands charged," the majority of the court held to be uncertain on the ground that the charge embraced second degree and manslaughter. Bartley, Corwin and Caldwell concurred in the majority opinion, Raney and Thurman dissenting.

Raney contended that neither of the lesser crimes was "the crime charged in the indictment. That crime is murder in the first degree, * * *"

The question was one of certainty of the verdict. The following extracted from the Raney opinion is instructive:

"If deliberation and premeditation are wanting, the charge as made is not proved, but if the balance of the elements are proved, he is guilty, *not of the crime with which he stands charged*, but of a lesser crime included within it, and exactly covered by such averments. The crime charged consists of a specific number of indispensable elements, *forming one indivisible whole*. Without them *all*, it does not exist; and with them all, charged in the indictment, and found to be true in manner and form as charged" * * * "they are effectually made part of the verdict."

When the Supreme Court had before it the question of the charge of first degree murder including the lesser offenses, in *Robbins v. State*, 8 O. S. 131, the indictment was for administering poison to a woman who was pregnant. The statute then provided that "*in all trials for murder*" the jury shall, if they find the defendant guilty, *ascertain from the evidence* * * * the degree of homicide." The trial court took the view that no *intent* was involved, and that such class of crime was not divided into different degrees of crime, as was murder purposely committed and with deliberate and premeditated malice. The majority opinion held that "in all cases of crim-

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inal homicide, the crime is graduated, and may be one or the other of the three degrees," holding that a verdict "as defendant stands charged is not sufficient"; that "murder by poison can not be made an exception." "The language of the statute is, "*that in all trials for murder*, the jury shall ascertain the degree of the crime." This is about all that Bartley, J., stated in respect to this question. It is apparent that this was based on what might have seemed to be the imperative language of the statute "that in all murder trials" when the jury finds defendant guilty it *shall* ascertain the degree of crime. This conception, even under the statute then existing, wholly fails to take the *evidence* or *proof* into consideration. The evidence showed that the woman to whom poison was administered died as a result thereof.

The holdings of the majority opinion on the questions of law are inconsistent with that portion of the opinion dealing with the form of the verdict. The *vital* question was whether the accused gave the poison with intention to kill, or whether the drug was administered to produce an abortion. The court held that if the latter was the purpose the crime was not murder in the first degree.

Judge Bartley's opinion fails to meet this question, page 195 being all that is stated in respect thereto; he merely states that manslaughter undeniably may be committed by means of poison, referring to a Connecticut decision to that effect. It contains no statement of principles or reasoning: this portion of the opinion is not of great weight. Swan and Brinkerhoff, J. J., dissented.

In the later case of *Adams v. State*, 29 O. S., 412 (1876), the indictment contained a count for deliberate and premeditated murder, and a second count for purposely killing while attempting to rob. The ground of error was that the charge to the jury precluded it from finding defendant guilty of murder in the second degree under the count of killing while attempting to rob.

White, J., in rendering the opinion especially states that the intention of *Robbins v. State*, O. S. 132, is not

“to deny that it is the right and duty of the court to *instruct the jury upon all questions of law arising before them in the case; nor to relieve the jury from the duty of receiving the law as given them by the court.* The principle of that ruling is that the jury must not be imperatively required to render a verdict for a particular degree of homicide.”

Judge White in the Adams case also referred to a Pennsylvania decision under a statute claimed to be similar to the Ohio statute, viz., the case of *Shaffner v. Commonwealth*, 72 Pa. St., 60, in which the charge of the court was that “if the prisoner is guilty, there can be no difficulty in ascertaining the degree, for being by poison, it must be in the first degree if purposely administered.” The jury was instructed that *if it was convinced of the guilt of the accused, “it is murder in the first degree as declared by the act * * * and it is your duty to say so without regard to the consequences to the prisoner.”*

The case of *Adams v. State*, *supra*, directly recognizes the position taken in the case at bar, and was in fact a modification of the *Robbins* case. It was a specific recognition of the right and duty of the court to instruct the jury *upon these questions of the law raised by the evidence.* It is stated in the syllabus, 4th Par., that, “* * * it is to the prejudice of the accused for the court to restrict the jury, in finding the defendant guilty of murder in the second degree, to one of the counts only.”

The instruction limited the finding of guilty of murder in the second degree to the first count of the indictment, which charged the killing to have been done purposely and with deliberate and premeditated malice.” The second count charged killing in an attempt to rob.

Here then is an express judicial recognition of the position taken by the writer in the case at bar. The charge in the Adams case in the first count charged premeditated murder, while the second count charged purposely killing while attempting to rob.

This case expressly overrules *Robbins v. State* and upholds the position taken in case at bar which eliminated both second degree murder and manslaughter.

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Comment has not been made upon *Beaudien v. State*, 8 O. S., 635 (1858). In this case counsel for state and defendant conceded and admitted that defendant was either guilty or not guilty of intentional, deliberate and premeditated malicious murder, or nothing; the court charged the jury accordingly, probably relying upon such admissions. No exception was taken to the charge. This was under the old statute providing: “*That in all trials for murder the jury * * * shall ascertain the guilt, etc.*”

The opinion is of little consequence upon the questions here. It was of the first class of homicide, involving neither murder by poison nor in perpetrating a felony; and the admissions by counsel could not be relied upon. The court should have charged the law applicable to the evidence.

Section 13692 as it now reads came into the Code in 1869, in 66 O. S., 312, Sec. 168. When *Adams v. State supra*, and *Dresback v. State*, 38 O. S., interpreted the provision differently than did *Robbins v. State*, etc., the court must have considered that the amended section should be differently interpreted than the original section in force at the time *Robbins v. State* was decided.

“That in all cases of murder when the jury finds defendant guilty the jury *shall* ascertain the degree of crime,” might reasonably appear to different minds as of different import than language that: “When the indictment charges an offense including different degrees, the jury may find the defendant not guilty of the degree charged and guilty of an inferior degree thereof.”

We think, however, the purpose and intent was always the same, the paramount question—being that the court should charge the jury *upon the law presented by the evidence*, or only upon the facts which the evidence tends to prove. It was not intended to confer discretionary power upon the jury to ascertain and determine the degree of crime *regardless of the evidence and law*, as some seemed to think it was; it *was not an unlimited or discretionary power*.

Dresback v. State, 39 O. S., 365 (1882), decided under Sec.

tion 13692 in its present form, though unsatisfactorily reported, nevertheless is sufficiently clear to show that it correctly decided the questions involved in murder by poison. Judge Spear and his associates, whose minds by their own admission were puzzled by Judge White's opinion, evidently failed in *Lindsey v. State*, 59 O. S., to understand the full import of the decision. However, Judge Wanamaker's clear exposition of the basic question in *State v. Schaffer*, 96 O. S., 215, has vitalized *Dresback v. State*, *supra*, as an authority by approving it and overruling *Lindsey v. State* in so far as the latter is in conflict with the principle there laid down that the law of a homicide case depends upon the evidence.

The indictment in the Dresback case was for murder by means of poison. In his opinion Judge White stated that:

*"The evidence against the accused tended to prove that he purposely killed his wife by administering to her poison; and it tended to prove no other grade of offense. If the jury found him guilty, it was their duty to find him guilty of murder in the first degree; but if the charge was not proved he was entitled to an acquittal. The court, however, instructed the jury that they might, consistently with their duty, find him guilty of murder in the second degree, or of manslaughter. * * *"*

This form of charge was held to be error.

Judge White specifically followed the principle of *Adams v. State*, 29 O. S., 415, to the effect that the Robbins case ruling *did not intend to deny the right and duty of the court to instruct the jury upon all questions of law before them*. Judge White distinguished the Robbins case (virtually overruled it), stating that the charge given therein was held to be an invasion,—*"while instructing them as to their duty upon a given state of fact in a case, is no such invasion."*

The trial court in the Dresback case erroneously instructed the jury concerning the degree of murder, first, second and manslaughter and,

"in effect," says Judge White, *"told the jury that their duty would be fulfilled, in case they found the accused guilty, by*

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returning a verdict for murder in the first or second degree, or for manslaughter.”

On the question whether the erroneous charge prejudiced the accused, Judge White stated:

“We have all the evidence before us, and cannot say so, the evidence is wholly circumstantial, and we are unable to say that the jury might not have acquitted him had they been properly instructed.”

There was prejudicial error, the court thought; if the jury had been correctly instructed the accused might have been acquitted. In the case at bar this court considered the charge more favorable to the accused, and that he stood a better chance of being acquitted than if verdicts for the lower degrees were submitted.

The effect of this Dresback decision was that the evidence and the law showed the defendant to be *either guilty of first degree murder or guilty of nothing*.

Whether the court in the Dresback made its ruling on the theory that murder by poison did not include different degrees, or that the evidence tended to prove no other crime than first degree or both, is immaterial. It is an authority supporting the action *in the case at bar in which the evidence only tended to show the guilt of murder when robbing deceased, and tended to prove no other offense*.

The decisions since *Robbins v. State*, have not discussed the principle of the higher grade of crime including the lesser degrees. Ever since the Robbins decision it has been assumed that first degree homicide includes the lesser degrees of homicide. So blindly has the *alleged* general rule of the statute been adhered to, regardless of evidence and law, that probably none have ventured to depart from what trial judges over and over again have believed to be improper practice. We have been sticking to the bark of supposed precedent too long, probably “playing safe,” probably, not considering the matter carefully, or perhaps being too timid. Progress will never be made unless old rules are sometimes broken. Having slightly broken away

from confirmed precedent in *Snouffer v. State*, 20 N. P. N. S. 65, in a case of premeditated first degree murder or nothing, which was approved by both reviewing courts, it is to be hoped that this venture will be the means of clearing away some cobwebs of precedent. In the last mentioned case the evidence *tended* to prove deliberate and premeditated murder and *tended to prove no other grade of crime*. The accused threatened and planned the murder; it was not a mere case of the use of a deadly weapon from the use of which, purpose and malice could be inferred. There was no sudden quarrel, no adequate provocation, no want of malice. Upon the evidence there should have been no instruction given upon either second degree or homicide. This in truth is the doctrine of *Adams v. State, supra*, *Dresback v. State, supra*, and carried to its logical conclusion is the rule of *State v. Schaeffer*, 96 O. S. 227, which lays down the general principle that no charge should be given nor form of verdict submitted for a degree of crime in any case where there is *no* evidence even *tending* to prove the same.

Counsel places great stress upon *Lindsey v. State*, 69 O. S. 216, which it is claimed reiterates the doctrine of *Robbins v. State*. The Lindsey decision seems so irreconcilably out of tune with the true theory as correctly stated by our court, and as supported by reason, that it should no longer be regarded as a sound precedent. It confesses misunderstanding of the Dresback case which decided the question correctly. Aside from this it will later be made to appear that Judge Wannamaker's opinion in the Schaeffer case, completely overrules it by the adoption of the fundamental principle that no charge should be given upon a crime when there is *no evidence to prove it*.

The puzzled minds were those of Judge Spear and his associates; the rule of decision in *Dresback v. State* is clear and sound, even though it be not set forth at length. The essential facts are there.

Returning to the Lindsey case, the form of the indictment set forth in full therein should be observed. The indictment in the present case is precisely like it. It charged first degree murder *in perpetrating robbery*; a revolver was used and the

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victim *immediately killed*. The trial judge charged the jury as to all three degrees of homicide, and in addition thereto instructed the jury as to assault and battery according to the past prevailing practice in deliberate and premeditated murder cases. The complaint on error was precisely the same as in *Dresback v. State*, a robbery case, that if the jury had been properly instructed they could not have found the defendant guilty of second degree as it did. There was *no evidence supporting the verdict*; the evidence clearly disclosed that the *deceased was killed* by means of a revolver *while defendant was attempting to perpetrate* a robbery. The evidence did not *even tend to prove murder* as defined by Section 12400, where one merely kills purposely and maliciously, not in the perpetration or in attempting to perpetrate a robbery. The Supreme Court seems to have affirmed the verdict and judgment *solely and only by reason of the fact that defendant's counsel invited the error by the form of request to charge* which was given, and *for the further reason that there was the element of the use of a deadly weapon and infliction of a mortal wound which caused immediate death*.

The verdict and judgment for second degree murder in the *Dresback* case was reversed because it was thought the jury would probably have found the defendant not guilty of first degree, if the jury had been properly instructed. So in the *Lindsey* case (robbery case) the verdict was for second degree, when it ought to have been either guilty or not guilty of killing while committing robbery. The *Lindsey* case should have been reversed as was the *Dresback* case, and for precisely the same reason. The fact that counsel for *Lindsey* invited the error might have been as appropriately disregarded, and the judgment could have been as appropriately disregarded, and the judgment could have been as justifiably reversed as was that in *Beaudien v. State*, 8 O. S. 635, because the court there misdirected the jury by acting upon the admissions of counsel, and though no exception was taken to the charge. The verdict in *Lindsey v. State*, *supra*, was erroneous for the reason that the *evidence tended to prove murder while attempting to rob*, and it tended to prove no other crime.

It was a typical case of maladministration, due to erroneous adherence to alleged precedent, by trial and reviewing courts.

The claim of the accused was that murder in the second degree could not be sustained under the indictment; that there should have been either an acquittal or conviction of murder in the first degree. But the court found no error, stating in its opinion that its conclusion was,

“in accord with the holding of this court in *Robbins v. State*, 8 O. S. 131; *Beaudien v. State*, 8 O. S. 634; *Adams v. State*, 29 O. S. 412, etc.”

The court, however, failed to discover the real import of the Dresback case and did not appreciate the plain facts as to what charge and proof was, it being stated that the report had puzzled many legal minds. The judgment in the Dresback case was reversed because the jury was erroneously instructed in a case of murder in commission of a felony.

Judge White distinguished the Robbins case by this language:

“The charge in the Robbins case was held to be an invasion of the province of the jury; while instructing them as to their duty upon a given state of facts * * * (is) was no such invasion.”

Murder in the first degree committed while perpetrating robbery, where the deceased is robbed and killed by a single act, embraces neither second degree nor manslaughter nor assault and battery, because the deceased was robbed and killed in one act or transaction.

The last Ohio decision to be considered is *State v. Schaeffer*, 96 O. S. 215, which announced the principle that no instruction should be given upon a degree or grade of crime when there is no evidence tending to prove the same. This is the fundamental proposition lying at the basis of the whole question; it is the principle upon which a proper meaning and construction shall be attributed to Section 13692, as a practical proposition of procedure.

Whether one or all three classes of first degree murder em-

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braces lesser degrees thereof depends upon the scope and intent of the sections creating the same. It was intended that Section 13692 should apply only to crimes having lesser degrees. It would seem that the language of the original provision: "That in all cases for murder * * * the jury shall, if they find defendant guilty, ascertain from the evidence the degree of homicide" had much to do with early conclusions that it was in the nature of a statutory power conferred upon the jury.

There never seemed any foundation for charging assault, or assault and battery in murder cases. The only fault to be found with *State v. Schaeffer, supra*, is that the court did not place its decision not only upon a want of evidence, but also upon the principle that it is not an included degree of crime.

There are but two inferior degrees of deliberate and premeditated murder, viz.: second degree and manslaughter. Assault and battery never was a lesser degree of homicide being an entirely different crime. There never was any justification for submitting a verdict for assault and battery. This having been an illogical mode of procedure ought now to be effectively eliminated by *State v. Schaeffer*. However, the judge delivering the opinion indulges in some unwarranted speculation on this subject. Assault is an act always involved in murder, but it is a mere incident and is merged in the homicide. Assault or battery can only be charged and submitted for decision when the person survives, or perhaps under some peculiar circumstances as in the Wells (Deshler) case tried by the writer where defendant claimed that he took hold of the deceased to take the revolver away from her, and while scuffling the revolver was accidentally discharged. But even then, I think a charge upon assault and battery inappropriate, because the indictment did not charge that offense.

Of course it is true as Judge Welch stated in *Martz v. State*, 26 O. S., 162, 168, that

"the jury might have found that it (death) resulted from some other cause."

It is significant that Judge Wannamaker's opinion (96 O. S., on p. 227) adopts the ruling in *Dresbach v. State*, 38 O. S., 365, and the *syllabus by the court specifically adopts and approves the doctrine of that case*. wherein the charge of the court in a poison case erroneously permitted the jury to find a verdict for the inferior degree of second degree murder or manslaughter, Wannamaker, J., stating that:

"Justice White clearly holds that *the crime charged was first degree or nothing*, because there was *no evidence tending to prove any other grade of offense*, and that if that charge was not proved, the accused was entitled to an acquittal."

Not only did the Supreme Court in *State v. Schaeffer, supra*, approve the doctrine of *Dresbach v. State, supra*, but it also specifically disapproved *Lindsey v. State*, 69 O. S., 215, "so far as (it) is in conflict with *Dresbach v. State*, 38, O. S., 365." That is, the doctrine enunciated upon the record in *State v. Schaeffer* not only disapproved the inclusion of assault, but it considered the general doctrine set forth in the *Dresbach* case—that where there is no evidence tending to prove any other grade of offense than the one charged in the indictment, the verdict must be for that charged, or of acquittal. Not only has "this assault and battery plea"

"been overworked to the great prejudice of the state, to the lessening of confidence in the judgment of our courts and juries, and to the undermining of the safeguards provided by law for the security and protection of human life,"

as stated by Judge Wanamaker, but misinterpretation of Section 13692 has also been so long and continuously overworked that for many years judges have either through fear of mistake or lack of courage contributed "all their might" to miscarriage of justice by giving the power to juries "to disregard the evidence," and "find one who is clearly guilty of first degree murder guilty of manslaughter or acquit him."

The charge of the court in the case at bar was framed solely upon the theory that "murder in the first degree in the commis-

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sion of robbery" does *not* embrace second degree murder nor manslaughter, but as well upon the fact that the evidence *tended to prove that crime or his innocence thereof, and that no evidence was offered tending to prove any other crime whatsoever*. That is the doctrine of *State v. Schaeffer*, 96 O. S., 215; *Dresback v. State*, 38 O. S., 365; *Adams v. State*, 29 O. S., 412. The latter case involved a charge of murder while attempting to rob. The jury were instructed that if the defendant purposely killed the deceased in attempting to rob him, the offense was murder in the first degree, and not murder in the second degree. "This was correct and it was the duty of the court to so instruct the jury," said White, J.

In the case at bar there was no evidence whatsoever tending to reduce the homicide to either second degree murder or manslaughter; true death was caused by a mortal wound, by a leaden bullet fired from a revolver; but as the indictment only charged first degree murder while in the commission of robbery and not intentional, deliberate and premeditated malicious killing, and as the *undisputed evidence* proved a killing while perpetrating a robbery, a legal verdict could only have been one of guilty or of not guilty.

Attention has been called to *State v. Harmon*, a case tried in this court many years ago, being cause No. 7538 tried before Judge Bigger formerly of this court. The indictment charged murder in the first degree while in perpetration of burglary. Judge Bigger charged that murder was divided into three classes, as did the writer in this case. He also stated that defendant was charged with the third class; and in the instruction to the jury it was stated that under a charge of killing purposely and with deliberate and premeditated malice a defendant may be convicted of either first degree, second degree, manslaughter, assault and battery or simply assault. He then charged (erroneously we think) that:

"But the crime charged in this indictment does not include the lower grade of homicide known as murder in the second degree. Under such an indictment as this a defendant may be found guilty of murder in the first degree, of manslaughter, of robbery, of assault and battery, or of simple assault."

Forms of verdict were therefore submitted to the jury corresponding with the offenses of which the defendant may be found guilty, and a form for acquittal, and the jury were instructed that it may sign the one it finds to agree with its findings under the law as given.

This case was reversed by the circuit court; we are unable to ascertain upon what grounds it was reversed but we are of the opinion that it was properly reversed for the reasons stated in this opinion.

We have pondered and studied the statutes, their history, and the decisions of our own state. But after all, the history, meaning construction and fundamental philosophy of the acts made criminal, are the things that count and which are of interest to the inquiring mind. Unusual consideration has been given the question and we are inclined to digress and philosophize upon it.

In view of the fact that the statutes have defined the three kinds of first degree murder clearly and specifically; in view also of the fact that by separate statute the act of inflicting a mortal wound by a revolver or deadly weapon purposely and maliciously has been constituted second degree murder, it certainly is not to be concluded by process of reasoning that because by another section the statute has provided that the same act which is penalized as second degree murder when committed in perpetration of robbery, can be held to be severable and penalized as second degree murder. It takes the two acts combined—the robbery and killing—to constitute murder. It is physically impossible to kill another under such conditions and be guilty of murder in the second degree. And when that appears clearly from the evidence, why permit the jury to speculate upon the uncertain philosophy whether a defendant can ever be held guilty of second degree murder or manslaughter, where the evidence shows the man to have been killed and robbed in the same act and by the same person. Can anything be more absurd than to charge the jury on second degree murder and manslaughter, and submit verdicts in a case like the one at bar? Why rack one's brain to conceive of conditions and circumstances under which a man charged with this class of homicide can be held for second degree or man-

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slaughter, in view of the fact that the three classes of homicide are as different from each other as day is from night.

It was never intended that this class of homicide should be inclusive of lesser degrees. If we continue to speculate on this question we will get back into the mysteries of common law homicide; or into a field of mystery as dubious as was common law murder cruel. It may be just as bad to continue the unreasonable and unjustifiable practice of charging the jury and sending verdicts to it, regardless of evidence and law. It is a question of power under Section 13692, judges have said; and the questions and forms of verdicts, for all theoretically included verdicts must go to the jury. No; it is a question whether courts will continue to abdicate their power, and continue to fail to perform their duty.

The act of killing in perpetrating robbery, and of purposely and maliciously inflicting a mortal wound with a deadly weapon causing death, are each separate distinct composite acts, selected for special penalization. The act of killing in perpetrating robbery is specially selected and penalized by death because of its greater atrocity, than is the mere killing purposely and maliciously which is second degree murder. It is true that the more heinous act or crime of killing when perpetrating robbery embraces the physical act of killing with a deadly weapon from which act intent and malice may be inferred or otherwise shown to make it second degree murder.

But the mere fact that it embraces the act of killing with a deadly weapon committed while committing first degree murder when robbing another, can never justify the separation of the lesser act that makes the composite crime of first degree murder when perpetrating robbery, and punish such minor act by assessing the minor penalty.

Under an indictment charging murder in the first degree in perpetration of a robbery it is impossible ever to legally render a verdict for second degree murder; if the accused did not kill while robbing another he is not guilty of the crime.

In formulating rules of law—by statute or decision—it is to be assumed that the same are designated for a definite purpose,

to cover a particular state of facts. When the state presents an indictment, it is to be assumed that if it charges one kind of murder, that the same will be drawn to fit the crime. If it is deliberate and premeditated murder, the indictment will so charge. Defendant will then be advised that the charge includes second degree and manslaughter. If it is murder in the commission of one of the felonies named, or of an attempt to commit the same, the accused is bound to know that he is charged with one specific crime which does not embrace mere "purposely and maliciously" killing (second degree) nor mere unlawful killing or killing without malice, or upon a sudden quarrel, or while engaged in the commission of an act made unlawful by statute (manslaughter). The charge may embrace acts common to other classes of first degree murder and other degrees thereof. It cannot be said, however, that killing another while robbing him is manslaughter because robbery is an unlawful act. If a burglar accidentally discharges a revolver and unintentionally kills an occupant of the house, can he be said to have killed another merely because he was committing an act of burglary made unlawful by statute. Such deduction is impossible because the word "purposely" qualifies the act of killing while committing burglary or robbery, and holds the accused to have purposely killed howsoever the killing may be done while perpetrating a felony.

Second degree murder falls within the class of purposely deliberate premeditated malicious killing. The elements of intent and malice of second degree are not embraced in a charge of first degree murder in the commission of a felony, as it is in the first class of premeditated murder.

The element of killing which is present in murder in committing robbery is a *concomitant act precisely as is the act of a mere assault, and cannot operate as a mere charge of purposely and malicious killing.*

In philosophizing upon the subject it is interesting to note the fact that in many other jurisdictions an intent to kill is not regarded as an essential, the mere act of killing while perpetrating the felony being sufficient. This coincides with or harmonizes with the inherent nature of the act, but the grammatical con-

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struction of our statute makes intent an essential. An intent is necessarily imputed to murder by poison, but does not harmonize so well with murder in commission of felony. By grammatical construction of Section 12400, it has been settled that the word "purposely" qualifies killing while perpetrating all felonies named in the statute.

Applying strict grammatical construction, we know that the words "either of deliberate and premeditated malice" in no wise qualifies the killing in commission of the several felonies, so that *malice* does not necessarily become part of this class of crime by virtue of Section 12400.

Therefore does not the exclusive language of Section 12400 defining this class of first degree murder eliminate malice as an essential element thereof? Concededly the ordinary definition of malice might appropriately characterize this class of murder. But that is besides the question, it being an axiomatic doctrine that we can only resort to the statute as the exclusive source of the elements of our statutory crimes. The word malice does not appear in the charge given in this case.

It is familiar history that there was no distinction between the different kinds of murder at common law; that motives of humanity led us to separate it into degrees. It is well known that the first statute making such division and reducing the law in respect thereto to statutory form was passed in Pennsylvania in 1794. Murder in the first degree by means of poison, lying in wait, or committed in the perpetration of, or attempt to perpetrate any arson, rape, robbery, or burglary was then made into a class of first degree, in addition to "any other kind of willful, deliberate and premeditated killing." This original provision in different language found its way into other states. Mr. Bishop upon review of the statutes in different states called attention to the difference prevailing, stating that the divergencies are not so great as to render all consideration of them unprofitable, *nor are their terms so absolutely alike, he states, as to make of one an entirely reliable guide to another.* Bishop Cr. L. Sec. 725 A. 1.

The universal judicial expression from early times was that murder perpetrated by any of the means mentioned in the statute,

or in the commission of any of the enumerated felonies, constituted murder in the first degree, without further evidence of willfulness, deliberation and premeditation. Decisions in our state have voiced this conception. In many states it was considered to matter not whether the murder was designed, but in Ohio the phraseology of the language was held to render purpose and intent essential.

. Pursuing this question further along the line of proper construction and interpretation, and considering all the several statutes in reference to homicide as a composite entirety, it seems rationally sound to conclude that first degree murder while in commission of any of the several felonies named, was designed to exclude any lesser degrees such as second degree and manslaughter—the constituent elements of which are wholly inconsistent with intentional killing while perpetrating a felony.

The language of the first class of first degree murder is of such import that it was designed to charge a special class of murder committed purposely and with deliberate and premeditated malice, which could not be constructed under any circumstances or conditions to have reference to any other class of first degree, the definition of which is descriptive of a class of homicide committed in such radically different manner as not to have the slightest reference to murder committed while perpetrating any felony. Murder while committing any of the felonies is held to be intentionally committed, but the statute does not specify that it shall be maliciously committed. The statute specifically makes malice an element of second degree, and also of the first class of first degree, but of none other.

Manslaughter is committed without malice, upon a sudden quarrel upon adequate provocation, or while committing some unlawful act made so by statute, so that there is no common element with manslaughter in murder in commission of a felony, unless it be without malice.

The definition of murder while committing any one of the felonies excludes the definition of either murder in the second degree or manslaughter. This seems a clear and very simple but significant proposition.

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Section 13692 simply means that when under any indictment for first degree murder, the charge as made embraces within its terms the essential elements of either second degree or manslaughter, and that when the evidence produced by the state *fails to prove any essential of the higher degree*, but does tend to prove *a lower degree*, or there is conflict in the evidence concerning the guilt of the accused of the particular degree, then an instruction should be given concerning the degrees and form of verdict submitted. But a charge of robbery and murder committed in perpetrating a felony embraces neither purposely or malicious killing, nor killing without malice or upon adequate provocation which reduces the grade; nothing can ever reduce the grade of murder in committing robbery.

Murder can become second degree only when the killing is done maliciously, but without deliberation or premeditation, and not by any of the specified methods or in the commission of the enumerated felonies. *State v. Decklotts*, 19 Iowa, 447; *State v. Moore*, 25 Ia., 128; *People v. Doyell*, 48 Cal., 85; *Caldwell v. State*, 41 Tex., 86; 18 Am. Dec. Note, p. 774-787.

The clear purpose of Section 13692 seems always to have been manifest; all crimes and criminal procedure is statutory, nothing depending upon the common law, except as incorporated in statutes; the definitions of every crime, and every step of procedure had to be expressly provided for by specific provision. Realizing that in trials of murder in the first degree in some cases the evidence may fail to prove the major charge, but may prove a lesser charge, it was necessary to make provision for such cases so as to enable the jury to perform its duty under the law and the evidence. Hence Section 13692. That the purpose of the statute shall be accomplished, it is incumbent upon the court to perform its function by giving accurate instructions based upon the evidence; if particular instruction be given the jury which is not based upon any evidence whatsoever; if for example this court had charged the jury in this case on the subject of second degree murder, or manslaughter, it would have given instructions upon crimes not involved in the case under the evidence adduced, and would have placed it within the power of the jury to have

speculated—or worse than that to have compromised their views, or to have exercised the powers of clemency which the constitution confers upon the Chief Executive, by commuting the crime.

The intent of the statute, even under the provisions when *Robbins v. State* was decided, according to our conception was not intended to confer *unlimited power*, or *power without direction of the court*, but rather the purpose was to grant *enabling power*—to give the jury the power to render a verdict upon any degree embraced in the charge when there was *any evidence tending to prove any one degree of crime embraced therein*, or when there was conflict to the evidence as to the degree of guilt. If there is no evidence tending to prove any lesser degrees, then the power exclusively vests in the court to direct the jury upon the law arising upon the evidence.

Whether there is *no evidence even tending to prove the charge* of an indictment is a question of law for the court. *If there is no evidence tending to prove the charge*, then the jury has *no power to find* a verdict upon that particular charge, and the court is without power to submit such question to the jury, thus enabling it to speculate, or bring about a miscarriage of justice.

Justice in criminal law and procedure contemplates the rendition of a verdict according to the rights of the state, as well as those of defendant.

The view apparently taken by some is that whether the jury may or may not find an accused guilty of either degree of crime embraced in the indictment, is a mere matter of statutory power—regardless of the evidence; that the court must in all cases submit the degrees embraced in the indictment to the jury without regard to the state of the evidence. An admission to this effect seems to have been made by Frick, J., in the majority opinion in *State v. Menhinnay*, 43 Utah, 135, Ann. Cas. 1916, 537, 544 as follows:

“Under our statute a murder so committed (in perpetrating a robbery) constitutes murder in the first degree and legally can constitute nothing else. True, a jury in any homicide case *has the power to disregard the evidence*, and may find one who is clearly guilty of first degree murder of manslaughter or acquit

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him. From this it is assumed that, because a jury may do this, therefore a court must submit all the degrees of murder, and thus give the jury the right to pass upon the several degrees of murder. This contention loses sight of the legal principle involved in the statute * * * (Murder perpetrating robbery) *which does not segregate* murder committed in the perpetration of * * * robbery into degrees. While it is true that under our jurisprudence a jury has the power, with or without reason, either to reduce the degree of crime, if it be divided into degrees, or acquit the accused, *it does not follow that a court is bound in effect to charge that they may disregard the law, the evidence, and their oath in arriving at a verdict. Neither is it correct to say that, by not submitting the question of second degree murder in a case where the killing was perpetrated in an attempt to rob, the court thereby coerces the jury to find the accused guilty of murder in the first degree.*

“Whether such might be the effect under our statute *depends upon the evidence.* If the evidence justifies a finding that the murder was committed in the perpetration of or attempt to perpetrate a robbery, it is the duty of the court to charge that, if they find beyond a reasonable doubt that the murder was committed in the perpetration of or attempt to perpetrate a robbery they should find the accused guilty of first degree murder, *and if the evidence, as in the case at bar, does not justify the jury under their oaths to find otherwise, the court need not submit the question of second degree murder at all.* In such a case, in merely charging on first degree murder the court does not, as is contended, withhold anything from the jury, but simply charges the law. It is the law and the evidence that fixes the degree of the offense, and when the facts are not in dispute and clearly show that the murder was committed as aforesaid, the jury have neither the legal nor moral right to refuse to follow the law and in effect amend or repeal the statute. Of course, if the jury refuses to be bound by either law or fact, a court is powerless, but the court is not required to partake of the wrong and in effect suggest to the jury that they may do what the law does not sanction.

“We are of the opinion that there was absolutely no evidence * * * which would have justified a finding by the jury other than that the murder was committed in an attempt to perpetrate a robbery.”

We could not have a better illustration of the soundness of the charge given in the case at bar in view of the evidence, as

well as the view here taken concerning the construction and meaning of Sections 11400 and 13692, than the Utah case. The charge in the Utah decision was murder in an attempt to rob. The court refused to charge the jury with respect to second degree murder. The indictment was framed upon the theory of deliberate and premeditated murder. Upon that view *as well as upon the statute which makes murder in perpetrating or attempt to perpetrate murder first degree murder, the case was submitted to the jury.* The opinion also stated:

“Where there was some evidence in this case from which the jury could have found a deliberate and premeditated murder, yet the jury would not have been justified in finding that the murder was not committed in an attempt to perpetrate a robbery, and upon the latter question there is not even room for doubt.”

The opinion also stated that whether there was *any* evidence in support of any essential fact is as much a question of law in a homicide case as in any other; *that the court must not abdicate its prerogatives.* This is the sound view; while the Utah opinion admitted that the statute dividing crimes into degrees enabled the jury to find in the lesser degree, it expressed the view *that such statute should not apply to a murder committed in perpetration of or attempt to perpetrate a robbery,*

“because a murder so committed is not divisible into degrees. In such a charge * * * the killing was either committed in the perpetration of or attempt to perpetrate robbery or it was not.”

In the separate opinion of McCarty, C. J., it was stated:

“The evidence * * * shows that the burglary, attempted robbery, and homicide were so connected and interwoven, each with the other two, that they constituted one transaction. * * * The killing of E was * * * by the undisputed evidence, murder in the first degree. * * * I am unable to conceive of a state of facts or circumstances * * * under which a murder committed in the perpetration of or attempt to perpetrate any of the felonies mentioned * * * would or could be less than murder in the first degree.”

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The last quoted matter is the keynote of the decision. It has been the view of the writer in the case at bar. Trial judges should not longer regard the purpose of Section 13692 as conferring unlimited power, and instructions should no longer be given which will in effect confer such power, and permit the jury to disregard both evidence and law.

The evidence of the dying declaration was that the two men robbed decedent; that although the latter begged the robber to take all he had but to save his life, nevertheless one of them immediately shot him, and drove away in his taxicab; they stole his car as well as all his personal belongings.

In Colorado it is said:

“It is well settled that in a prosecution for murder where there is no evidence from which a jury would be justified in finding the defendant guilty of manslaughter a trial judge is not required to instruct upon that grade of homicide.” *Demato v. People*, 49 Colo., 111 Pac. 703; Ann. Cas., 1912 A. 783; *Mow v. People*, 31 Colo., 351; *Crawford v. People*, 12 Colo., 290; *Carpenter v. People*, 31 Colo., 284.

In *Territory v. Nichols*, 3 N. M., 111, it was held that the charge must be given to all the degrees to which the evidence is applicable, *but not when there is an entire absence of evidence as to any degree.*

In *State v. Thorne*, 41 Utah 414; Ann. Cas., 1915 D, p. 90, a request that the jury be charged that defendant might be found guilty of either murder in the first degree, or second degree, or not guilty was refused, the reviewing court stating:

“The court’s charge was proper. There was no evidence upon which the jury could base a verdict of second degree murder. Under the undisputed evidence and under his own admissions appellant was guilty of murder in the first degree, or he was not guilty at all.”

In *Dietz v. State*, 149 Wis., 462, 136 N. W. 166, Ann. Cas. 1913 C. (1912), the charge was murder in the first degree of which defendant was convicted. The error complained of was in not charging the jury that there might be a conviction for

murder in the second degree, or of some of the lesser degrees of manslaughter, instead of submitting only the question of murder in the first degree.

“Here, again,” said the court, “it would be sufficient to say that no instructions submitting the lesser degrees of crime were requested, but we prefer to place our ruling upon the broader ground *that under the evidence there was no room for any intermediate finding. The defendant was either guilty of murder in the first degree or he was innocent.*”

In *People v. Milton*, 145 Cal., 169, the court held that the class of homicide committed in the perpetration of or attempt to perpetrate robbery, etc., *the crime is murder in the first degree and none other.* In *Milo v. State*, 56 Tex., Cr. 196, 127 S. W., 1025, the court in considering the statute making killing while committing a felony murder in the first degree stated: “*This statute eliminates murder in the second degree in homicides of this character.*” “When the Code said murder committed in a certain way was murder in the first degree, the law makes it so, and a jury by its verdict could not find otherwise.” *Essery v. State*, 72 Tex. Cr., 414.

In *State v. Spivey*, 151 N. C. 676, 65 S. E., 995, the evidence showed that the homicide was committed by lying in wait or in an attempt to commit arson. The instruction eliminating second degree was approved, the court stating:

“There was no evidence from which the jury could have found murder in the second degree or manslaughter. * * * Where the evidence tends to prove that a murder * * * was done by means of poison, etc., * * * or *which has been committed in perpetration or attempt to perpetrate any arson * * * robbery, etc., and where there is no evidence and where no inference can fairly be deduced from the evidence of or tending to prove a murder in the second degree or manslaughter, the trial judge should instruct the jury that it is their duty to render a verdict of ‘guilty of murder in the first degree’ if they are satisfied beyond a reasonable doubt, or of ‘not guilty.’* If, however, there is *any* evidence or if any inference can be fairly deduced * * * tending to show one of the lower grades

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of murder, it is then the duty of the trial judge * * * to submit that view to the jury. *It becomes the duty of the trial judge to determine, in the first instance, if there is any evidence, etc., * * * tending to prove one of the lower grades of murder.*"

In *State v. Zeller*, 77 N. J. L., 619, 73 Atl., 498, it was claimed the court erred in taking from the jury the function imposed by statute to determine the degree of guilt, by eliminating second degree. All the evidence tended to show murder committed in the perpetration of robbery. The evidence disclosed that if the accused was guilty at all, he was guilty of murder committed in perpetration of robbery. It was held that the charge was therefore entirely proper.

In *People v. Schleiman*, 197 N. Y. 383, 18 Ann. Cas. 588, 90 N. E. 950, 27 L. R. A. N. S. 1075, the indictment contained a count for deliberate and premeditated murder, as well as a count for murder committed while engaged in committing burglary. The defendant was tried on the count for homicide while committing the burglary. The evidence tended to prove murder while committing a burglary and tending oward nothing else. It was held that the jury could not find defendant guilty of any lesser degree, and that there was no error in refusing to charge in reference to the various degrees, and instructing the jury to find the defendant guilty of the first degree or not guilty.

In *State v. Curtis*, 93 Kansas, 743, 1915, the information charged murder in the first degree perpetrated in an attempt to rob, and also murder in the second degree independent of such felony. The jury were instructed: "That under the information in this case * * * the defendant is either guilty of murder in the first degree or he is not guilty." Held:

"Upon the charge of murder in the first degree apart from the allegation of an attempt to rob, the jury should have been instructed upon the lesser degrees *if there was any evidence, although slight, tending to show any lesser offense included in the principle charge.* Second; the evidence was sufficient to require instruction upon the lesser degrees."

It appears further in the opinion that where the general charge is made of first degree murder the court is bound to instruct the jury concerning the lesser degrees to which the evidence applies; by this is meant where the charge is of deliberate and premeditated murder. Then it is stated:

*“But where the evidence shows beyond question that a defendant is either guilty of murder in the first degree or innocent, it is unnecessary upon the general charge of murder in the first degree to instruct the jury upon any other degree * * * if there is even slight evidence tending to prove a lesser degree it is erroneous to restrict the jury from finding a verdict accordingly.”*

In *Commonwealth v. Romezzo*, 235 Pa. St., 407, the court stated:

“Where it appears that the killing was committed for the purpose of robbery the court commits no error in telling the jury that if this was so it was murder in the first degree, and that it was their duty to so find.”

The charge was to the effect that the jury had the right to say that the defendant was guilty of murder in the first or in the second degree. *“But, if you find that there was wilful, deliberate and premeditated murder with malice * * * or that the murder was perpetrated in the commission of * * * robbery * * * then there is no room for murder in the second degree, and you should so find.”*

In conclusion it may be appropriately stated that because of the importance of the question involved, unusual care and consideration have been given this case. However, the views of the court have not been arrived at merely upon a consideration of this case; it has been a growing conviction after much consideration in the trial of a number of first degree murder cases that there has been an erroneous mode of practice not within the spirit and clear intent of our laws, statutory and precedent, and that such view should at some time be cleared up. It never can be if the trial judges continue in the old path.

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The length of this opinion, and the copious citation, quotations of decisions, and discussions seems justified by reason of the status of our own decisions upon the subject. The statement made by Lincoln concerning the preacher whose sermons were long, that when he commenced writing he was too lazy to stop, may be appropriately applied to the writer. But we have written in "self defense."

In respect to the claim in the amended motion for new trial that the admonitions given at 9:15 p. m., urging the jury to agree, the court will let the record speak for itself. Such admonition is not to be regarded as a charge or an instruction to the jury in the technical sense. It was only designed to urge the jury to make a reasonable effort to arrive at a verdict. The endeavor was to be equally considerate of both parties to the action—the state and defendant. It is well settled practice in criminal procedure that a court may properly state to a jury that the case should be settled by a verdict if reasonably possible, because of the expense to the county and the equally importance to, and interest of a defendant in having the case come to an end by a verdict; and so long as the court does not make such admonitions stronger on the one side than on the other no error can be committed. And it was likewise the duty of the court not in anywise to coerce the jury in arriving at its verdict. We think from a careful reading of this admonition it will not appear to be in violation of law. We have had experience in other important cases concerning this question and had given it much careful consideration. (See Ohio Civil Trials, Sec. 673.) In the legislative bribery cases a jury was kept out for three days, and the jury was admonished from time to time to make a reasonable effort to agree, and the case was affirmed.

In reference to the time book of the Hulse factory and the error complained of by the refusal of the court to admit the time book in evidence, it may be appropriate to state the grounds of this conclusion. It was not such a book that could be handed to the jury from which alone without extrinsic evidence they could determine a fact. The witness Henderson, the time keeper,

stated that he could not tell whether defendant was at work at the factory on the date in question from his independent recollection. He produced a time book, and upon examination and offer of introduction it appears that the book itself from the manner in which it was kept would not precisely disclose the fact whether defendant had worked on the date in question. The witness made certain explanations as to the manner in which the time was kept. On suggestion of court the witness was permitted to use this book to refresh his recollection; he was allowed to state the method by which he took and kept the time, to relate how he made the rounds to see whether the men working were on duty. It was fully developed by this witness that the book in question showed that Bandy was working on the date in question. The jury had before it the claim of fact just as fully and perhaps more clearly by the evidence as it was introduced than it would have had by making an examination of the book itself had it been admitted.

In respect to the errors complained of in the admission of the keys, etc.; as one would sit in the trial of the case noticing the developments made by the evidence the whole conduct of the accused after the commission of the crime becomes important. As the testimony was brought out concerning his conduct at the room which he occupied and its contents and what was done with certain things of which he had possession, it seemed to the court that the disposition of the bunch of keys and of the revolver in the manner shown by the evidence became competent and relevant touching his conduct after the crime. Of course, the keys alone would have no special relation to the manner in which the killing was committed; still the defendant's actions, his possessions and course of conduct subsequent to the murder and until he was apprehended was all considered as competent and relevant. The defendant sought to lay bare his whole life; and his life while he occupied the room where he was arrested, where the keys and revolver were found, were important items in his life. It does not seem therefore that the introduction of the keys standing as it does in the record constitutes prejudicial error.

The motion for a new trial is overruled.

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COLLISION DUE TO JOINT NEGLIGENCE.

Common Pleas Court of Hamilton County.

FRANK A. MERTZ v. THE OHIO ELECTRIC RAILWAY CO.

Decided, April Term, 1919.

*Negligence—Where Concurrent on Part of Plaintiff and Defendant—
Instruction to Jury as to Last Clear Chance not Justified—Street
Car and Truck in Collision—Both Motorman and Chauffeur could
have Avoided the Accident.*

A street car struck the rear end of an automobile truck crossing the tracks at a street crossing. The motorman and the driver of the truck had equal opportunity to observe the approach of the other, and equal power at all times to avoid the collision, the motorman by decreasing the speed of the car and the driver by increasing the speed of the truck. Whether either, both or neither exercised reasonable care in the use of the means of avoidance was the disputed question of fact determined by the jury:

Held:—That the evidence did not justify a charge on the last clear chance doctrine against the defendant for the reason that the evidence proved that plaintiff's negligence, if any, was concurrent with that of the defendant, if any, and continued up to the time of the collision; that at no time was there a last clear chance for the defendant, by exercising the power of avoiding the collision possessed by him to nullify any previous negligence of the plaintiff, which is the *sine qua non* of the last clear chance doctrine; and that therefore the case was properly submitted to the jury by instructing it on the law of negligence, contributory negligence and proximate cause developed by the evidence.

Michael Minges and Albert A. Graef, for plaintiff.

Sherman T. McPherson, contra.

MATTHEWS, J.

The jury having returned a verdict for the defendant, this case now comes before the court upon the plaintiff's motion for a new trial.

The plaintiff while riding in an automobile truck, driven by his agent, was injured in a collision between the automobile

truck and the defendant's street car at a street intersection. There was conflict in the evidence at the trial as to the details such as sounding of gongs, rate of speed, etc., but these facts were admitted or conclusively proved:—The plaintiff and more than fifteen other young men were in this automobile truck going through Hamilton on their way from Cincinnati to Dayton. At about ten o'clock in the morning they arrived at the intersection of Dayton and Seventh streets, where defendant's track crossed the former street. There were certain shade trees obstructing the view, but the car track was straight at that point for some city blocks, and the driver of the automobile truck had the same opportunity to see as had the motorman on the street car. Neither, however, did see the other, and the driver of the automobile truck proceeded to cross the track going at a rate of speed less than fifteen miles per hour. The street car was not proceeding at a high rate of speed, but there was testimony, which was contradicted by other testimony, that there was no slowing down of the street car and it struck the rear of the automobile truck, throwing the plaintiff therefrom and injuring him. The speed of the automobile was not increased just before the collision, and of course the fact that the rear of the automobile truck was struck indicates that if the speed of the street car had been slackened or that of the truck increased, there would have been no collision.

In defining the rights and duties of the parties in this situation, the court, among other things said:

“A driver of a street car on tracks in the streets of the city, must observe, and the driver or motorman of the street car that struck this automobile truck was obliged to observe such watchfulness as ordinary prudence demanded for persons and vehicles crossing its tracks, and must have his street car under ordinary control, and must do the things required by ordinary care under the circumstances, in the handling of the street car as would enable him to avoid injuring others who have equal rights in the streets.”

Also,

“It is the duty of drivers or motormen of street cars on the streets of the city to use ordinary care in watching ahead for

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vehicles, and to drive at a rate of speed reasonably safe for other users of the street under the circumstances, etc.”

Also,

“At this point the court will say that only that negligence of a party to this case can be considered by you, which is the proximate cause of the collision, or contributed to the proximate cause of the collision. If either the plaintiff or the defendant had, prior to this collision, been guilty of any negligence that had ceased—had spent its force—prior to and before the collision, then that negligence would not be the proximate cause, or a part of the proximate cause of the collision, and should be disregarded by you. And any negligence, that is, failure to use reasonable care, on the part of the plaintiff, or on the part of the defendant, which continued up to the time of the collision and existed at that time, and was a part of the proximate cause of the collision, should be considered by you as negligence on the part of the plaintiff or the defendant in this case.”

Also,

“If you should find that the defendant was guilty of negligence, substantially as claimed by the plaintiff in his petition, and that that negligence was the proximate cause of the injury, and you further find that the plaintiff at the time was in the exercise of reasonable care, and by plaintiff I mean the plaintiff personally and also the driver of the automobile, then the plaintiff is entitled to recover.”

At the close of the general charge, counsel for plaintiff requested the court to charge to the effect that if the motorman on the street car saw, or by the exercise of ordinary care, should have seen the automobile truck as it was crossing or entering upon crossing the car track, and that from that time on he had time to avoid this collision by bringing it entirely to a stop, then the truck would have had the prior right to cross, and such conduct would have been negligence on the part of the motorman. In response to this request the court further charged the jury in this language:

“When that street car approached the street intersection, and when that automobile truck approached the street intersection,

both the motorman and the driver of the automobile were obliged to use reasonable care to anticipate and discover the intentions of the other, and upon discovering—upon the motorman discovering the intention of the driver, or when in the exercise of ordinary care he would or should have discovered the intention of the driver and his purposes, then it was the duty of the motorman to exercise reasonable care in the light of the intentions and purposes of the driver of the automobile.

On the other hand, the same duty rested upon the driver of the automobile to use reasonable care to discover the intentions and purposes of the motorman on that street car. And when he did discover those intentions, or when he would or should have discovered those intentions or purposes in the exercise of reasonable care, then it was his duty to exercise reasonable care in the light of those intentions and purposes on the part of the motorman.

And if either failed to exercise reasonable care under the circumstances, and that failure was the proximate cause or contributed to the proximate cause of the collision, then the respective parties are chargeable and accountable with the negligence.”

It is now urged that the instruction of the court failed to sufficiently emphasize the so-called last clear chance doctrine, in that the court did not respond to the request completely and in the language requested by counsel for plaintiff. At the trial the court was of the opinion that the evidence did not justify a charge which directly pointed out the defendant as the party to this collision that might be supposed to have had the last clear chance of avoiding the collision. The court at that time was of the opinion that the evidence was conflicting and the situation which developed was such that a fair charge to the jury necessarily required that the jury be told that the rights and duties of the parties at the time were substantially reciprocal, and in responding to the plaintiff's request for further instruction, it was the purpose of the court in what was said to the jury, taken in conjunction with what had already been said, to place the plaintiff and defendant upon an equal basis and leave it to the jury to determine whose negligence caused this collision. Upon reflection, the court adheres to the opinion entertained at the trial. There was no point in this occurrence where the sole power of avoiding this collision rested with the defendant, or

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where the plaintiff, who was operating a vehicle of equal or greater mobility, had not an equal power of avoiding the collision. It was a case of joint negligence continuing up to and merging to form the proximate cause of the collision. It was not a case for the court to emphasize the last clear chance of avoidance as resting with the defendant.

It is urged that the case of *West v. Gillette, Admr.*, 95 Ohio St., 305, is an authority entitling the plaintiff to such a charge on the last clear chance doctrine, and it is also urged that the last clear chance doctrine is a doctrine operating in favor of a plaintiff and never against the plaintiff.

In the opinion of the court the case of *West v. Gillette* is entirely dissimilar upon its facts. In that case the decedent, driving in a covered wagon, approached the street car tracks, and by the motorman's own testimony, he actually saw and had in constant view this covered wagon from the time it was several hundred feet away from the place where it was struck until the collision took place. The record did not show what the decedent did to avoid the collision. It did not show whether he looked, or listened and in view of the fact that it was a covered wagon the motorman did not know, and because of the decedent's death in the collision the evidence did not disclose definitely, whether the decedent was conscious of the approach of the street car. The motorman, however, fully appreciated the danger to the decedent, and the evidence justified the theory that he relied exclusively on blowing his whistle and approached the crossing without slackening the speed of his car, notwithstanding he did not know whether the driver (decedent) was alert to the peril. The evidence, therefore, justified the theory that the sole power of avoiding this collision rested with the motorman, and that the jury might have so found.

The evidence in the case at bar was such that upon no distinct or clear theory of the evidence could it be said there was a point where the sole power of avoidance of this accident rested with the defendant. It was a case of negligence, if any, concurrent and contemporaneous with the collision. The motorman in the case at bar testified that the automobile truck came upon the

track immediately in front of the street car without any prior knowledge on his part of the chauffeur's intention so to do and that he did all that he could to avoid a collision, whereas, the motorman of the street car in *West v. Gillette* testified that he saw the wagon continuously as it traveled several hundred feet toward the street car track. The difference in the facts of the two cases is shown in the second paragraph of the syllabus of *West v. Gillette*, which we quote:

2. Where a collision occurs and such driver is injured and the undisputed evidence shows that the motorman actually saw such vehicle and had it continually in view for a considerable distance from the crossing, it is for the jury to determine whether he exercised such vigilance and care in the circumstances; and the fact that the driver may have been originally negligent in the manner of going on the crossing will not, as matter of law, defeat his right to recover for the injury, if the motorman has not used such vigilance after discovering him."

Counsel for plaintiff cites several cases in support of his position, but in the opinion of the court they are all distinguishable. They are cases either where the last clear chance doctrine was not invoked, or where the chance of avoiding the collision rested clearly with the defendant, or where the negligence of the defendant was the sole proximate cause of the accident, and in which the negligence of the plaintiff was manifestly remote.

In *Railway v. Kiner*, 17 C.C.(N.S.), 431, there was no charge given on the last clear chance doctrine, and because of the slow moving character of plaintiff's vehicle, he did not have equal opportunity to avoid the collision.

In *Railroad Co. v. Kasson*, 49 Ohio St., 230, the defendant knew that the person injured was on the track in a helpless condition and of course unable to avoid the injury.

In *Greve v. Traction Co.*, 21 C.C.(N.S.), 331, the verdict was directed and no charge on last clear chance given, and furthermore, it was a case in which if plaintiff's was believed, there had been no prior negligence to be avoided by the application of the last clear chance doctrine.

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In *Harris v. Railway Co.*, 19 C.C.(N.S.), 410, the plaintiff's horse was beyond her control and running away in plain view of the motorman. She did all she could to avoid the collision, but owing to the circumstances she was powerless, and legally in the same situation as the injured person was in *Railroad Co. v. Kasson, supra*.

Those are all the cases relied upon by plaintiff, excepting *Traction Co. v. Brandon*, 87 Ohio St., 187, in which the facts are identical in all essentials with those of *West v. Gillette*, and what has been said in regard to that case is equally applicable to the former.

The rule for which plaintiff contends is stated as favorably to him as it can be stated in Section 241 of *Thompson on Negligence*, and is as follows:

“Notwithstanding the previous negligence of the plaintiff, if, at the time when the injury was committed, it might have been avoided by the exercise of reasonable care and prudence on the part of the defendant, an action will lie for damages resulting from it.”

The plaintiff's case did not meet the requirement of this rule for the reason that whatever negligence the plaintiff was guilty of was not negligence prior and preceding that of the defendant, but was negligence contemporaneous with and of exactly the same character as that of the defendant and continued down to the very time of the collision.

It seems to the court also, that the law is that the duty of avoidance of injury is reciprocal and that the state of the evidence in this case required the court to so state without emphasizing that the duty rested, under any supposed theory of the evidence, upon either party. It is clearly the law, that where the plaintiff by exercising ordinary care can avoid the consequence of defendant's negligence, he can not recover. This is stated in Section 227 of *Thompson on the Law of Negligence*, in this language:

“Another proposition is that, although there may have been a continuing act of negligence or misconduct on the part of the

defendant, continuing down to the time of the accident, yet if, by the exercise of ordinary care, the plaintiff could have avoided receiving injury from it, but failed to exercise ordinary care and did receive injury from it, he can not recover damages.'"

See also the same author at Section 240.

By accelerating the speed of the automobile the collision could have been avoided as readily as by reducing the speed of the car, and the facility for so doing was as great as that of the defendant to reduce the speed of the car.

It is the opinion of the court that the charge fairly stated to the jury the rules of law applicable, and left it to the jury to determine whose negligence, if any, caused the collision, and that the jury found either that it was the plaintiff's negligence solely, or in contribution with the negligence of the defendant that was the proximate cause of the collision, and in view of the conflicting evidence the court is not disposed to disturb the verdict, and therefore, overrules the motion for a new trial.

PROSECUTION FOR SELLING ADULTERATED LARD.

Common Pleas Court of Crawford County.

C. W. MILLER V. THE STATE OF OHIO.

Decided, 1919.

Adulteration—Prosecution under Section 12758—Variance between Affidavit and Proof as to Kind of Container Used—Principal Guilty Where Sale is Made by Employee.

1. When the affidavit under Section 12758 of the General Code charges one with unlawfully selling one "can" of lard which was adulterated, and the evidence shows a sale of two pounds of lard in a paraphine dish or container, this is not a variance.
2. Where the evidence shows such sale was made by an employee authorized to make sales, the principal is guilty and it is not necessary for the affidavit to state the sale was made by an agent or employee.

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Miller v. State.

E. J. Myers, for plaintiff in error.

C. A. Meck, contra.

WRIGHT, J.

The plaintiff in error was prosecuted under Section 12758 of the General Code for selling adulterated lard. He was found guilty before the justice of the peace and error is prosecuted to this court for reversal.

One of the alleged errors is a variance between the allegations of the affidavit and the proof.

The affidavit recites that "one C. W. Miller * * * did unlawfully sell unto one John M. Mote * * * a certain substance purporting, appearing and represented by the said C. W. Miller to be one can of lard and having the semblance of lard, which substance was then and there adulterated, etc." The evidence showed that a quantity of two pounds of supposed lard was sold, which was placed in paraffin dish or container.

Is this such a variance as would prejudice the rights of the accused?

He is charged with selling an adulterated article, without specifying the quantity. He is fully advised in the affidavit of the charge he is expected to meet or plead to, viz., unlawfully selling adulterated lard to a certain person at a certain time and place. It is unnecessary to describe or name the receptacle in which the lard may have been handed over to the purchaser, and if such receptacle is described in the affidavit, such description is surplusage, and proof showing a different receptacle would not take him by surprise, or require different proof on the part of the accused to meet the charge, or prejudice his rights in any way.

The gist of the offense is the selling of adulterated lard. If he had been charged with selling an adulterated "can" or other container, there might be some reason for claiming a variance.

It is further contended that the sale having been made by an employee, that the employer could not be guilty through the agency of his employee.

The offense charged against the accused is a misdemeanor. In misdemeanors all are principals. Though the sale was made

by an employee, the responsibility and guilt of the proprietor is clearly settled by the case of *Williams v. State of Ohio*, 25 Ohio Circuit Courts, 673, and affirmed by the Supreme Court without report (69 O. S., 570), in which the court held as follows:

“One who engages in the business of selling oleomargarine to the public and permits and authorizes its sale by his clerks or employees, is bound to see that the law regulating its sale is complied with, and if it is violated by such employees or clerks, the employer is liable under the statute.”

There is no prejudicial error in the record and the judgment of the justice of peace will be affirmed.

CONSTRUCTION OF ONE SECTION OF THE COLD STORAGE ACT.

Common Pleas Court of Franklin County.

STATE OF OHIO, ON THE RELATION OF HUGO N. SCHLESINGER,
PROSECUTING ATTORNEY OF FRANKLIN COUNTY, RELATOR,
v. COLUMBUS PACKING COMPANY AND THE FAIRMOUNT
CREAMERY COMPANY, DEFENDANTS.

Decided August 8, 1919.

Storage of Foodstuffs—Extension of Beyond the Statutory Limitation as to Time—Constitutes Violation of the Valentine Anti-Trust Law—Sale by Order of Court of Property Held in Storage Beyond the Time Limit.

1. Section 1155-13, General Code, of the “cold storage act,” is not a health measure or a statute to prevent the sale of unwholesome foodstuffs, and in nowise inhibits or prevents a court from ordering the sale of stocks of food which have been held in storage for a longer time than is permitted by said act and in restraint of trade and violation of the Valentine Anti-Trust Law.
2. Nor is the right of the court to seize and sell such foodstuffs affected by the fact that some or all of said property may already have become the subject of a contract of sale, since both the ven

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dor and the vendee, by their violation of the said statute, have rendered the property unsaleable in their hands, and the placing of it upon the market by the court is a benefit both to them and the public to whom it may be sold.

3. It is not necessary to decide the question whether there has been intentional hoarding before the property involved under such a seizure is ordered sold.

Hugo N. Schlesinger, Prosecuting Attorney, and *John H. Summers*, *Ray J. O'Donnell*, *Charles J. Saffin* and *Ralph J. Bartlett*, Assistant Prosecuting Attorneys, on behalf of the Relator.

Timothy S. Hogan and *Oscar W. Newman*, for the Receiver; *Smith W. Bennett*, *Ralph E. Westfall* and *Hugh M. Bennett* for the Columbus Packing Company; *Fred C. Rector* for the Fairmont Creamery Company.

DUNCAN, J.

On application of the receiver herein for an order authorizing him to sell certain property of the Columbus Packing Company, defendant herein, now in storage with defendant the Fairmont Creamery Company, which property is now in the hands of the receiver.

In granting the restraining order herein and appointing a receiver, the court has already stated that by the defendant packing company permitting many thousands of pounds of pork to remain in storage for such a period of time that said pork can not now be offered for sale by said packing company without the violation of Section 1155-13 of the so-called "cold storage" act, as alleged in the petition, acts have been done which can tend to but one end, the restrain of trade with respect to this commodity and the maintaining of the high price of pork in this community by the voluntary withdrawal from the market of said large amount of pork, which acts, in the opinion of the court, constitute a violation of both the letter and the spirit of the Valentine anti-trust law.

The court thereupon granted the restraining order prayed for, and appointed a receiver, that the property in question might be protected from destruction and ultimate loss, the de-

fendant, the Columbus Packing Company, having voluntarily rendered said property unsalable in its hands.

Upon the application of counsel for the receiver for an order authorizing the receiver to sell said property now in his hands, the defendant packing company has appeared in court by representative and by counsel, and has objected to the order issuing and affidavits have been filed in opposition thereto.

Several grounds of objection have been advanced and presented in argument, chief among which are the following:

First, that the court has no authority to order the sale of the property in question by reason of the provisions of Section 1155-13 General Code, in that said section inhibits the sale of said property by any person.

Second, that not all of the property in question has remained in storage in excess of the statutory period of six months.

Third, that some of the property in question had been negotiated before the expiration of the six months period, either by being actually sold or made the subject of a contract of sale.

Fourth, that there is no present necessity for the sale of said property to prevent its loss or destruction, and that if taken out of storage by the receiver and offered for sale, there will be danger of its decay and destruction.

The court will discuss these objections in the order enumerated.

First. The court is of the opinion that Section 1155-13 General Code, does not inhibit or prevent the court from ordering the sale of the property in question by a receiver. Said section is not a health measure or a statute enacted to prevent the sale of decayed or tainted meat or foodstuffs, but is a statute enacted to prevent the hoarding of foodstuffs and the consequent restraint of trade of such commodities. The history of the act, which the court has carefully investigated, and the logic of the matter convince one beyond any doubt that this is the true purpose of the act. It would be ridiculous to presume that it was the intention of the Legislature in enacting this section to render unsalable in the hands of the court foodstuffs left in storage beyond the statutory limitations, and thereby cause its destruction and loss. Such a construction would manifestly defeat the

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very purpose of the act. Had the Legislature intended the destruction of such property, it would have provided means for its confiscation and disposition. It would be absurd to presume that the Legislature intended to fix arbitrary periods of time, at the expiration of which foodstuffs automatically passed from a condition of wholesomeness to a condition of unwholesomeness. The condition of foodstuffs is determined by inspection and not by any such arbitrary rules. The seizing of this property by the court is not a confiscation, but is the taking over of the control of foodstuffs which the owner thereof can no longer offer for sale, and is an act for the public welfare, and incidentally is an act for the benefit of the owner himself.

Second. Since the date of the placing in storage is marked upon each piece of the property in question, and since a report has been made by the storage company as to the dates of the placing in storage of said property in question, it can be easily ascertained what property has been left in storage beyond the statutory period, and the receiver will be ordered to sell only such property as has so remained in storage.

Third. If a portion of the property in question has been made the subject of a contract of sale, such contract of sale does not affect the matter at issue and is purely a matter between the packing company and the second party to the contract. No actual delivery of any specific pork is averred herein. The packing company no doubt has pork loins which have not been in storage beyond the statutory period with which they can carry out said contract of sale. If a portion of said property has been actually sold and has been left in the warehouse of the creamery company beyond the statutory period, that does not affect the application of the cold storage act since the vendee can no more offer the property for sale than can the vendor, the packing company. If this proves to be the fact the vendee can not prevent the application of the statute, and the taking of the property by the receiver.

According to the report of the Creamery Company all the property in question in the hands of said company stands in the name of the Columbus Packing Company, and if any of said

property has been actually sold the vendee thereof can come into court upon distribution of the proceeds of the sale by the receiver and ask for and receive his proportionate share of said proceeds. He can have no cause for complaint since the court is ordering sold for him property that he can not himself offer for sale.

Fourth. It may be, and doubtless is true that the property in question is in no immediate danger of destruction or loss, but inasmuch as the packing company can not offer the same for sale, either now or in the future, it is manifestly in danger of ultimate loss and destruction. For the public welfare it must be conserved and ultimately sold by the receiver, so why not now? Nothing can be gained for anyone by delay and possible loss may result. It is not necessary to wait until a decision as to whether or not the property in question has been actually hoarded, for the reason that nothing could be gained for anyone thereby. The property in question, whether it be found to have been intentionally hoarded or not, can not be sold by the Columbus Packing Company or any vendee thereof. Hence, defendant packing company can not be injured by the failure of the court to first decide the question of intentional hoarding before ordering the property in question sold. Of course it is not the intention of the court to order or permit the receiver to withdraw from storage at one time this large amount of pork and thus endanger its preservation. It will be ordered kept in storage and only withdrawn therefrom as the demand for its sale and consumption justifies.

Having now discussed the objections of the defendant packing company and found them without merit, the court will grant the application of the receiver and order sold the property in his hands which has remained in storage beyond the statutory limitation. It is the desire and will be the order of the court that this property be sold in a manner and at a price conducive to the benefit of the general public, and the court trusts that this action may in a measure tend to reduce the present general high cost of living and may serve as a warning to all hoarders of food stuffs that the laws of this state can not with impunity be violated.

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JURISDICTION IN HABEAS CORPUS.

Common Pleas Court of Franklin County.

IN RE JULIA FAYE BELLE, HABEAS CORPUS.

Decided, December 2, 1918. -

Custody of Child—Probate Court without Jurisdiction in Habeas Corpus for Recovery of Child—Where Writ is Served upon the Custodian at her Residence in Another County—Jurisdiction in which the Custody Exists should Determine whether such Custody should Continue—Section 12171 a Puzzle.

1. The statutes prescribing venue and the service of summons in commencing an action have no application to proceedings in habeas corpus.
2. Jurisdiction is not obtained by the probate court in an action in habeas corpus for possession of a child, where the child and its custodian are residents of another county and the writ is served in such other county.

T. M. Sherman, for applicant.

C. M. Addison, contra.

KINKEAD, J.

This is a proceeding in error from the probate court. Julia C. Belle, mother, brought proceedings in habeas corpus in the probate court to obtain the custody of her child.

The claim is that the probate court of this county was without jurisdiction. The child was in the custody of its paternal grandmother who resided in Athens county. The custody of the child was legally vested in the father by a Missouri court decree in divorce. The father placed the child in the care and control of its grandmother, Catherine Wolfe, the respondent below.

The writ of habeas corpus was directed to the sheriff of Franklin county, who made return that he "served the within named Catherine Wolfe by handing a * * * copy * * * at her home in Jacksonville, Athens county, etc." * * *

Catherine Wolfe, respondent, filed a motion to dismiss the action for want of jurisdiction. To obtain jurisdiction over the respondent and child by habeas corpus it is contended that the

proceeding should have been commenced in Athens county, where both child and respondent resided.

Counsel for respondent in error contends that as habeas corpus is regarded as essentially a civil action (*Henderson v. James*, 52 O. S. 542), provisions of General Code concerning venue, Tit. 4, Div. 2, ch. 3, apply; that Sections 11268-11276 do not apply, but that Section 11277 governs. The latter section of the Code provides that:

“Every other action must be brought in the county in which a defendant resides or may be summoned, except actions against an executrix, etc.” * * *

We go back to the pages of legal history to obtain light upon the subject.

Section 604 of the original 1851 Code provided that, “until the Legislature shall otherwise provide this code shall not affect proceedings on habeas corpus, quo warranto, or to assess damages for private property taken for public uses * * * (and other special statutory proceedings enumerated) * * * nor any special statutory remedy not heretofore obtained by action.

“The design of the code as shown in Section three,” said the codifying commissioners, “and in all its parts, is to furnish one civil action, which shall take the place of all the actions at law, and all suits in equity. There are many proceedings in courts, which are not commenced by any of the actions at law, or by the common law bill in chancery. These proceedings are not ordinary, but special, and the action of the Code does not take their place, or supplant them. It only takes the place of *actions* at law and suits in equity.” (Quoted in Ohio Civil Trials, Ch. X-a, Section 289-i, being new matter inserted in the volume after all copies off the press had been consumed.)

Section 605 of the 1851 Code further provided that if a civil action be given by statute, and the mode of proceeding is prescribed, the same was not to be affected by the new code “*until the Legislature shall otherwise provide.*”

The pertinent question in this historical retrospect is the matter of “*the mode of proceeding prescribed*” in habeas corpus. A new mode was prescribed by the Code of 1851 for the new

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civil action which it created; any *existing remedy* was not to be affected by the civil code, *unless* or “*until the Legislature shall otherwise provide.*” The Legislature never *otherwise provided* any other way of commencing habeas corpus than by issuance of the writ. The civil code of 1851 made provision that rights of action given by it or secured by existing laws were to be prosecuted in the manner by it provided (Section 603 Original Code, 51 O. L., 161), *except as provided by Section 604 thereof* (51 O. L., 161).

This historical review fully shows that the statutes prescribing the venue and service of summons in the commencement of the ordinary civil action have no application whatever to proceedings in habeas corpus.

At the time of enactment of the civil code the manner of commencing the extraordinary proceedings in habeas corpus was already regulated and governed by special provision, which has not since been changed or modified.

The act securing the benefit of the extraordinary writ of habeas corpus was enacted February 22, 1811 (29 O. L. 164; 1 S. & C. 681 *et seq.*). Section 1 thereof provided,

“that if it be made to appear to the ‘judge’ or ‘judges’ that the person is detained without legal authority it shall be his duty forthwith to allow a writ of habeas corpus; which shall be issued forthwith by the clerk * * * *directed to the proper officer, person or persons who detain such prisoner.*”

An amendment to the habeas corpus act was passed February 8, 1847, which added the provision which is now Section 12171, viz.:

“Section 12171. The writ may be served in any county by the sheriff of that or any other county, or by a person deputed by the court or judge.” 45 O. L., 45.

The amendment of 1847 added what is now Section 12169 and following sections, viz.: Sections 12169 to 12180 inclusive.

The provision found in Section 12170 introduced the remedy as one to be pursued in cases of confinement, or *detention by a person not an officer*. In other words, since the 1847 amendment

the writ has been recognized as the appropriate remedy in controversies respecting the custody of minor children.

The expression found in 52 O. S. 259, that, "a proceeding in habeas corpus is essentially a civil proceeding and not a criminal proceeding" is of no bearing here. It is not a civil action in the same sense as is the new civil action created by the Code; it is not governed by all the incidents respecting proceedings therein as is the ordinary civil action. Some of the statutes relating to proceedings in the ordinary civil action apply and govern, but not those relating to the commencement and service of the initial process essential to bringing the same.

Habeas corpus is commenced by the filing of a petition and issuance of a writ,

"which may be served in any county, or by a person deputed by the court or judge."

The contention of counsel for respondent that Section 11277, which provides for the commencement of certain actions in the county which a defendant resides or may be summoned, is not well taken. Nor is the argument of counsel for the petitioner sound that Section 12171 authorizing the writ to be served in any county confers jurisdiction in the probate court of a county where the petitioner resides but in which neither the respondent nor the child resides.

It must be conceded that writs of process properly issued and served constitute the essential steps to confer jurisdiction. The rule is well expressed by Read, J., in *Lessee v. Mooreland*, 15 Ohio, on p. 444, viz.:

"A court acquires jurisdiction by its own process. If the process of the court be executed upon the *person* or thing, concerning which the court is to pronounce judgment, jurisdiction is acquired. The writ draws the *person* or thing within the power of the court. The court once having, by its process, acquired the power to adjudicate upon a *person* or thing, it has what is called jurisdiction. This power of jurisdiction is only acquired by its process."

The jurisdiction of the probate court is prescribed by statute pursuant to Section 2, Article 4, Constitution. In substance,

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the Constitution provides that the probate court shall have "jurisdiction in habeas corpus in any county or counties, as may be provided by law." The words "in any county or counties" were used as an enabling rather than a restrictive sense (4 O. S., 308). They have no special reference to the present question. Section 12162 is the only provision conferring jurisdiction upon the probate court.

It will be conceded that the probate court can exercise no jurisdiction outside the county; it can acquire no jurisdiction in respect to any matters committed to it except within the confines of the county.

"Jurisdiction to issue the writ is generally dependent upon the territorial jurisdiction of the court or judge." 21 Cyc., 309.

In *Re Jewett*, 69 Kan., 830, it was held that the court:

"had no jurisdiction to direct the issuance of a writ to run outside its district, and that its service * * * outside such district gave the judge no jurisdiction."

In *McGowan v. Moody*, 22 App. Cases (D. C.), 148, it was held that the District of Columbia had no jurisdiction in habeas corpus to inquire into the grounds of the detention of a person, not an inhabitant of the district.

An instructive opinion is found in *Re Jackson*, 15 Mich., 416, where a writ was not issued when the infant was beyond the jurisdiction of the court, although the custodian was within the jurisdiction; Campbell and Cooley, J. J. See *People ex rel.*, etc., 68 N. Y. Supp., 279; *Hunt v. Hunt*, 94 Ga., 257.

In *Simmons v. Iron & C. Co.*, 117 Ga., 305, 61 L. R. A., 739, the rule was recognized that a judge has no authority to issue a writ directed to a person holding another in custody beyond the territorial limits of the court.

In *Re Edward Talbot*, habeas corpus, 9 W. L. B., 271, the petition was filed by the mother of the child and the writ issued out of the Hamilton County Common Pleas Court. Johnston, J. in his opinion stated:

"It seems that the child was found in the custody of its father in Hancock county * * * where he and the child at the time were living or domiciled, and the body of the child having been produced before the court, the father made return

and answer, setting forth, in substance, that he was its father, and that he was a resident of Hancock county.”

The answer of the respondent alleged that divorce proceedings were had, and that he had been decreed the custody of the child. The mother, the petitioner, resided in Cincinnati.

Of course, the respondent submitted himself to the jurisdiction of the court.

In *Ex Parte Everts*, 2 Disney 33 (Gholson, J.), habeas corpus was brought in Cincinnati by the father against the mother who lived in Dayton, while she was in that city immediately after a habeas corpus case had been dismissed by the federal court, the writ having been served upon her surreptitiously before she had left the city. The court exercised its discretion and held it had no jurisdiction on account of the circumstances connected with the service.

In the course of the opinion, however, Judge Gholson made pertinent suggestions concerning the vital elements entering into jurisdiction in such cases. He stated:

“It is a right or privilege of parties not to be drawn into a forum which the law has not appointed for the adjudication of questions in which they are interested. This right, or privilege, it may be the duty of the court to protect, and this privilege should be extended to every party interested. A mother may have the right to custody of the child, even against a father, and then the child would have a reciprocal right to the care and protection of that mother. Whether these rights exist, may be a question for legal adjudication. The privilege of the forum to make that adjudication, is, it appears to me, as important to the child as to the mother. If, then, a father or a mother has the actual custody of a child, the jurisdiction in which that custody exists should properly determine whether it should continue or be changed. I cannot understand how any other jurisdiction could interfere without a disregard of the rights of the child. Any other conclusion would place the child in the position of a chattel, and its custody would be decided as a question of ownership.”

The ground upon which Gholson, J., decided the question of jurisdiction is familiar and sound. His suggestions concerning *status* and residence of parties are pertinent in this case and

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may be enlarged upon. The proceeding, though *ex parte*, is in fact designed to operate upon and sever the control and custody which the respondent has and exercises. If, as Judge Gholson contends, service upon the mother and custodian should be had in her own forum, which was her right and privilege, how different would it have been if, as here, the writ had been issued to the sheriff of Hamilton county and served upon her at her residence and domicile in Dayton?

It must be concluded that Section 12171 authorizing the writ to be served in any county by the sheriff of that or any other county was not designed to enable a probate court of one county to exercise jurisdiction over persons domiciled or residing in any and all other counties, regardless of their want of residence or domicile in the county where the proceeding is brought.

But the query will probably ever be present; then why was this statute enacted and what was its purpose or design? A significant fact it is that since 1847, when it was made into law, this point has never been adjudicated by a reported case. This ought to be some evidence or reason why it does not bear the construction ascribed to it by the petitioner here. We have exhausted all resources of our fertile imagination to discover what the purpose of this statute was. The writ is the exclusive method of commencing this proceeding, and it is provided that it may be served in any county by the sheriff of that or of any other county. But we do not believe it to have been intended to issue and be served in any or all the territorial forums of the other eighty-seven probate courts. Jurisdiction is conferred upon the probate court by Section 12162 and not by Section 12171.

The probate court is created by Article 4, Section 7 of the Constitution which provides that, "there shall be established in each county a probate court, etc." Its jurisdiction is provided for by Section 8 of Article 4, Constitution, the latter part of which authorizes "such other jurisdiction, in any county or counties, as may be provided by law." Neither constitution nor statute provides for the exercise of jurisdiction beyond its territorial limits.

The respondent protested against jurisdiction over her, and

properly saved the question and did not voluntarily submit herself to the jurisdiction of the court.

Suppose the domicile and residence of the respondent was in this county, but both she and the child were making a temporary visit in Athens county, in such case service would be proper and jurisdiction of this probate court for Franklin county would be properly acquired.

The court erroneously assumed jurisdiction; judgment being in favor of the respondent it is affirmed.

CUSTODY OF CHILD.

Common Pleas Court of Hamilton County.

IN THE MATTER OF ROBERT LUTKEHAUS.

Decided, July 22, 1919.

Parent and Child—Custody of Seven-Year Old Boy—Claimed by Father and by Maternal Grandmother—Welfare of Child—Superior Right of Parent.

The welfare of the child is not the sole determining factor where the right of its father to its custody has been challenged; and in the absence of a showing of unfitness of the father, or of inability on his part to provide a suitable home for the child, he will be awarded its custody over the claims of the maternal grandmother, with whom it has been living for some time and whose affection for and ability to give the child a good home are not questioned.

W. J. Overbeck, J. W. Conroy, counsel for relator.

C. L. Swain, J. Q. Martin, contra.

DIXON, J.

This is a proceeding in habeas corpus, brought by the relator Harry L. Lutkehaus, to recover the custody of his child Robert Lutkehaus, a minor seven years of age, who, the relator claims, is being unlawfully deprived of his liberty by one Evelyn V. Stroud, who is the child's maternal grandmother.

From the pleadings and evidence it appears that the relator and Olive Stroud, the daughter of the respondent, were married on

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April 29, 1911, and from this union the child Robert whose custody is now in controversy, was born on March 9, 1912.

Immediately upon their marriage, relator and his wife, who were both quite young at the time, took up their abode in the home of the respondent, the wife's mother, pursuant to an arrangement made between respondent and relator as to the payment of the living expenses of the home.

For some reason, which does not satisfactorily appear from the evidence, the married life of Lutkehaus and his wife was far from happy, and as a result of this domestic infelicity, Lutkehaus left his home about two years after his marriage, and never afterwards lived with his wife. This action on the part of the relator caused his wife, in March, 1914, to apply for a divorce from the relator, in the insolvency court of Hamilton county, Ohio, on the ground of gross neglect of duty. In November of the same year the court granted the wife a decree, the husband not appearing in court, and also gave the wife the exclusive custody of the child Robert, and ordered the respondent to pay, in addition to a lump sum for past support, the sum of \$4.00 per week for the future support of the child. The relator complied with this order for the support of his child rather indifferently, and as a result he was arrested at the instance of the Humane Society, upon the affidavit of his former wife, and committed to the city workhouse.

Relator claimed that his failure to fully comply with his obligation to support his child was due at times to his inability to obtain employment, and again to the constant efforts of his former wife and the respondent, her mother, to prevent him from seeing his child whenever he called at respondent's home for that purpose. The latter reason of course furnished no legal excuse for relator's failure to properly provide for his child. It nevertheless shows to some extent at least, that relator was not bent on entirely neglecting his child, and that he still had considerable love and affection for the child, but like many other laymen, when placed in similar circumstances, he felt that if he could not see his son he should not be compelled to pay money to those who were depriving him of this right.

After she obtained her divorce from relator, his former wife lived with the child Robert, in the home of her mother, until May, 1916, when she was married to one Joseph Fisher, and thereupon she left the home of her mother, and with the child took up her abode in a separate home with her husband Fisher.

In March, 1918, the relator enlisted in the army, and while in the service he claims to have made provision by allotment for the support of his son. He was honorably discharged from the service in January, 1919, and returned to Cincinnati.

In the meantime, while the relator was in the army, his former wife died, on August 31, 1918, and upon her death the respondent took the child into her custody and control. The relator commenced this proceeding on February 8, 1919, shortly after he returned home, and learned of the death of his former wife.

The respondent claims that the relator has no legal or moral right to the custody of the child, for the following reasons:

First: Because he abandoned the child and the child has become a stranger to him.

Second: Because he is not a fit or suitable person to be entrusted with the care and education of his child.

Third: Because the child has become greatly attached to the respondent, in whose home he has lived most of his life.

In discussing the law to be applied in determining this controversy, counsel for the respondent contend in their brief, "that the polar star of the legal question is, and always was and always will be, the welfare of the child."

This contention is undoubtedly entitled to very serious consideration; but if we may continue the metaphor, it must also be remarked that when courts turn their legal telescopes to study the firmament for light and guidance in cases of this character, they immediately observe the presence of another luminary, slightly less brilliant perhaps than the "polar star" just mentioned, but one nevertheless which can and does throw out many useful and helpful rays, and whose existence can not and should not be denied.

This second stellar body may be designated the "rights of the parents." It is universally recognized by the courts that pa-

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rents have the natural right to the custody and control of their children, and in case of the death of one parent, the surviving parent has the *prima facie* right to this custody and control.

It is also recognized however, that this inherent natural right of the parents with respect to the control and custody of their children is not an absolute right, but is subject to judicial control whenever the safety, welfare or interest of the child demand it, and must yield whenever the real and permanent welfare of the child requires a different disposition.

Natural rights are not conferred by constitution or statutes, but they are expressly guaranteed by them, and thus become a part of the civil law and are commonly referred to as legal rights. Such rights the state may regulate and control, but such power of modification or control on the part of the state should always be exercised within the limits which are fixed by the purposes of society.

It is self-evident that if the rights of parents are to be entirely subordinated to the welfare of their children in determining this question of custody and control, few families would be safe from the danger of involuntary disintegration through the application of such a rule.

It is clear therefore, that the welfare of the child must be and is a relative and not an absolute consideration.

In *Stapleton v. Poynter*, 111 Ky., 264, the court say:

“While the welfare of the child is to be considered in determining who is to have its custody, the legal right of the parent should also have weight, and therefore, the widowed mother of a boy nine years old is entitled to his possession as against his paternal grandparents with whom he has lived for several years, though they have fortune, character, kindness and affection for the child, and though he prefers to remain with them, the mother being a person of moral habits, without contagious or infectious diseases, and of enough industry to reasonably assure the child from want.”

Again, on page 268 in the same case, we find the following language used by the court:

“Nowhere has it been held, so far as we are aware, that a parent, however indigent, ignorant or even vicious, can be deprived

by law of the custody of his child at the suit of a stranger, however charitably disposed and prepared he may be to give the child the advantage of coveted opportunities for its moral or intellectual development."

In *Dunkin v. Seifer*, 123 Ia., 64, the syllabus is as follows:

"The fact that a parent is less able than another to provide for his children will not support a claim of adoption where it appears that he has not abandoned this custody, is able to give it a decent support, and is morally fit to have it in charge."

There are numerous authorities to the effect that between persons who do not claim custody with equal right, the welfare, position or moral worth of the person or persons opposing the claim of the parent are entitled to slight consideration.

In *Clark v. Bayer*, 32 O. S., 299, syllabus 1 is as follows:

"As a general rule the parents are entitled to the custody of their minor children. When they are living apart, the father is *prima facie* entitled to have custody, and when he is a suitable person, able and willing to support and care for them, his right is paramount to that of all other persons except that of the mother in cases where the infant child is of such tender years as to require her personal care; but in all cases of controverted right to custody the welfare of the minor child is first to be considered."

In *re Coons*, 20 O. S. C., 47, syllabus 4 reads as follows:

"In a controversy for the custody of the child, the paramount object which governs the court is the benefit of the child, and all rights must yield to that.

"5. But when all else is equal, and no present reason exists for departure from the rule, the right of the father to the custody of his minor child is superior to that of any other person."

It is claimed by the respondent that the relator abandoned his child when the child was a mere infant, and for this reason he should not now be permitted to resume its custody and control.

It appears from the evidence that the former wife of relator, who was the mother of the child, obtained a divorce from relator shortly after the child was born, on the ground of gross neglect, and that prior to the commencement of the divorce proceeding

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the relator left his home, which was likewise the home of his mother-in-law, the respondent here. What caused relator to thus leave his home does not appear. It is true that he supported his child very indifferently after the divorce, but it can not be said in the absence of any evidence on this point, that his departure from his home and his subsequent indifference to the welfare of his child were prompted by any desire to abandon the child, or by any lack of affection for the child, or interest in its future welfare.

Manifestly, the relator was not welcome in the home of his former wife and mother-in-law after the divorce, and consequently he did not intrude himself upon them. That they cared nothing for him, and were determined to wholly alienate the child from him, and blot out of the child's memory any recollection of the father, is apparent from the fact that upon the second marriage of the child's mother the father's name was abandoned and the child became known in the neighborhood of his home and at school by the name of Fisher, which was the name of the second husband. This was not only an injustice to the father, but to the child as well. Under the circumstances of this case, there was positively no justification for depriving the child of its true and correct name.

It must further be borne in mind that the relator has never by any agreement relinquished his right to the custody of his child, nor has he acquiesced in the assumed custody of the respondent.

The decree entered in the divorce proceeding between the relator and his wife gave the custody to the wife, where in law it exclusively remained up to the time of the wife's second marriage, and thereafter until the wife's death. It was only upon the death of the child's mother, in August, 1918, that the respondent became the sole custodian. For more than two years prior to her death, the mother of the child, together with her second husband, and the child, lived in their own home, apart from the respondent, so that during this time at least the child was not even in the partial custody of the respondent.

The respondent took the child upon the death of the mother, while the relator was in the army, but immediately upon his

return to civilian life the relator, upon learning of the death of his former wife, instituted this proceeding. He was guilty of no *laches*. He began at once to contest the right of the respondent to retain the custody of his child, whom she had had for a period of less than six months because of the relator's service in the army.

The mere fact that for the first four or five years of the child's life the respondent lived under the same roof with the child, and its legal custodian, does not justify the assumption that during this time the respondent was the child's custodian. This was a mere circumstance, which is entitled to little if any weight in determining the question of the present right of custody. Such considerations are sentimental, rather than legal.

We now come to the question of the fitness of the relator to assume the custody and control of his child. The respondent claims that he is not a fit or suitable person to be entrusted with the care and education of his child. What is the evidence in support of this claim?

At the time the matter was heard, the relator had just returned to the city after being honorably discharged from the army. He was making his home with his parents who appeared in court in his behalf, and who appear to be, and unquestionably are, persons of the highest respectability. In the home of such parents, there certainly exists no environment that could jeopardize the child's present or future welfare, and both are eager to have the little grandchild brought into their home.

Before he entered the army, the relator was earning about \$90 per month, and testified that he could earn that much and probably more as soon as he got back to work again. Such earning power would easily enable him to properly take care of his child.

There was some testimony at the hearing to the effect that while the relator and his wife were living together the relator was almost continually in a condition of financial embarrassment; that he did not always pay his debts, and that he borrowed money from the respondent. Financial embarrassment is not a crime, nor is it even a fault in many instances. Among young people, especially those who have just entered the nuptial state sickness

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poor management, or small earning capacity not infrequently brings about financial distress in a newly established home.

It may also be true and there is some evidence to the effect that the relator at times indulged in pasttimes not conducive to thrift, such as betting on race horses, and the like, and that he was guilty of slight indiscretions with respect to the use of money, which did not make for his financial betterment.

We shall not however, attempt to determine whether or not this conduct or these habits in any way affected the relator's fitness to take charge of his child. All these things occurred, if at all, five or six years ago, and unless the relator is shown to be an unsuitable person at the present time to have the custody and control of his child, the fact, if it is a fact, that at some time in the past his conduct or habits may have been such as to make him unsuitable or unworthy, furnish no legal reason for withholding from him this parental right now.

By an almost unbroken line of decisions, extending through the entire body of English and American law, this principle has been repeatedly confirmed.

In re Deming, 10 Johns, N. Y., 232, the court held that the father of certain children, who had been convicted of a felony, and sent to prison for life, was not, for this reason alone, rendered unfit to have the custody and control of his children, upon being pardoned and restored to full citizenship.

In the matter of Rabourg, 3 N. Y., 323, the court indicated that the fact that the father had been a confirmed drunkard and subject to attacks of delirium tremens would not militate against his parental rights with respect to his children, in the face of his satisfactory proof that at the time of the hearing he had completely reformed.

Courts have undoubtedly, and in the main very properly, refused to permit parents to have the custody and control of their children when at the time of the application for such a right it is shown that because of the immorality, viciousness, intemperance, criminal propensities or general unfitness of the parent seeking the custody it would be dangerous and detrimental to the child's welfare to place it in the care of such a parent.

But there is no evidence of the existence of such conditions here, and there is therefore no necessity for further discussion on this point.

It is argued however, with much force by counsel for respondent, that because of the great love and affection that exists between the child and the respondent for each other, the child should not be taken from the custody and control of the respondent. That this love and affection exist is indisputable. Nor will any attempt be made to question the ability of the respondent to give the child a proper home, or her fitness and suitability to rear the child in environments that would be free from any menace to the child's welfare.

During the time that the child was in the custody and control of the respondent, she has unquestionably done everything within the limits of her means to provide for the child's comfort and welfare, and would undoubtedly continue to do so in the future if the child remained with her.

But, loath as the court is to interfere with this relationship, it is inevitable that under the law and the facts of this case it must be done, for the rights of the relator in this case are paramount to those of the respondent, and the recognition of them can not and does not jeopardize the interests of the child.

The petition of the relator is therefore granted, and the care, custody and control of the child awarded to the relator, to commence on the first day of August next, and as indicated in the Coons case *supra*, "in the meantime every facility must be given the child to become better acquainted with its father, and opportunity that its affection may go out to him, and that the child may be apprized and prepared as well as may be for this change of custodians."

There must also be given to the respondent, Evelyn V. Stroud, the grandmother of the child, opportunities to see and visit the child at suitable and proper times, so that the transfer of the custody of the child from the grandmother to the father may be brought about and maintained under conditions least calculated to excite or grieve the child.

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**PRIORITY AS BETWEEN MECHANICS' LIENS AND A
CONSTRUCTION MORTGAGE.**

Common Pleas Court of Clark County.

FRANK GEER AND W. E. OSBORN, v. CHARLES K. TUGGLE ET AL.

Decided, March 13, 1919.

Liens—Owner Absconds before Construction of New Buildings is Completed—No Priority as between the Liens of Mechanics, When—Mortgage Securing Funds for the Improvement—Not Prior to the Liens of Mechanics and Materialmen, When—Meaning of the Word "Job" as Used in the Statute—When an Improvement is "Commenced"—Subrogation—Sections 8310 and 8321.

1. Under the mechanics' lien law there may be as many original or principal contractors as there are persons contracting with the owner for any part of the work.
2. Where liens are filed by several contractors, having separate contracts with the owner for distinct parts of the same building, the liens obtained by materialmen and laborers have no priority among themselves, but all participate *pro rata* in the proceeds from sale of the property, irrespective of the dates of their several contracts.
3. All liens obtained for labor done or material furnished in the building of any given structure take preference over incumbrances recorded subsequent to the commencement of the work of construction.
4. A structure is begun when some such labor is performed or material furnished under a contract made in good faith with the owner as will be easily distinguished by a person examining the lot to be the beginning of the construction. A house is begun when some work has been done towards the digging of the foundation.
5. Where a loan is made under an agreement that the mortgage given to secure its payment shall be a first lien on the property mortgaged, then incumbered with other liens which are paid out of the money so loaned in order to give the lender the first lien as promised, the lender is neither a stranger or a volunteer; and when the money so loaned and so used can not be made under the mortgage, the lender is entitled to be subrogated to the lien which was so paid with the money advanced by him for that purpose.

6. Payment of the money as the work progresses, under a mortgage securing funds for a building improvement, does not destroy priority over a lien intervening between payments of the installments, where the mortgagee has obligated himself to pay the mortgagor in due course the amounts covered by the mortgage.
7. While mortgages given to improve real estate or pay off prior incumbrances are not strictly speaking construction mortgages and, therefore, not entitled to all the privileges provided by Section 8321-1, nevertheless money actually advanced under such mortgages and used in satisfying the claims of laborers and materialmen should in equity be considered as applied to the claims of such lienors, and the lender should be subrogated to the rights of such lien holders to the extent that they were benefitted by the payments so made.
8. There is no rule in Ohio by which the value of an unimproved lot can be appropriated to the payment of a mortgage and the value of the structure to the payment of the mechanics' liens.

Donald Kirkpatrick, Geo. B. Smith, Forest Kitchen, Fred Anderson, Roscoe Lorenz, Hagan & Hagan, M. T. Burnham, George Raup, Attorneys.

GEIGER, J.

In the spring of 1917, one Charles K. Tuggle purchased four separate lots, upon each of which he began the erection of a dwelling house. Each lot was mortgaged by him to the Springfield Building & Loan Association to secure the money for the erection of said dwelling houses.

The money secured from the Springfield Association was in part applied to a prior mortgage upon said lot made by said Tuggle to the Provident Savings & Loan Association.

Tuggle entered into contracts with various materialmen to furnish material used in the structures. There was no general contractor, but all contracts for material were made with the owner Tuggle.

Various sums were advanced as the buildings progressed by the Building & Loan Association to Tuggle; a part of this money he used for the payment of material and work upon the buildings, but before the buildings were completed he absconded, leaving the material men unpaid.

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A receiver was appointed who completed the structures. Afterwards the various properties were sold, but the proceeds were not sufficient to pay the mortgages and material men. The various material men secured mechanics liens, and the question now arises upon the distribution of the fund received, as between the mortgages and the liens secured by the material men.

Lot 8834 was purchased by Tuggle from the American Savings & Trust Company, the deed being recorded on February 17 1917, at 2:30 p. m. The lot was mortgaged to the Provident Association for \$2,000, which mortgage was received for record February 19th, 1917, at 3.45 p. m. Other mortgages were made upon said lot by Tuggle, which were recorded at a later date.

The Springfield Cement Products Company had a contract for excavating for and construction of the foundation. On the 21st day of February, this company began digging the cellar under a contract with the owner.

The company was paid \$123.67 on May 3d, for the work done by it in constructing said foundation.

The Provident Association, under its mortgage paid to Tuggle from March 2d to May 15, the sum of \$1,325.

On June 8th, a mortgage from Tuggle upon the same lot to the Springfield Association, for \$2,600 was received for record. It was agreed between Tuggle and the Springfield Association that the association should have a first lien upon the premises, and on June 8th the association made a check to Tuggle for \$1,325, the amount due to the Provident Savings & Loan Association; and Tuggle, together with the attorney for the Springfield Association, went to the office of the Provident Association and paid to it \$1,325, whereupon the mortgage to the Provident Association was cancelled.

The Springfield Association paid to Tuggle the sum of \$2,200 on said mortgage. The value of this lot, without improvement was \$700.

Henry Nicklas conveyed lot 51 to Charles K. Tuggle by deed dated May 7th, and recorded May 10, 1917 at 9:45 a. m. On May 10th, Tuggle mortgaged said lot to The Springfield Associa-

tion for \$2,600, which mortgage was recorded May 10, 1917, at 2:35 p. m.

Under this mortgage the Springfield Association in eight installments, beginning May 19 and extending to July 6th, paid to Tuggle \$2,200. The value of the lot without improvement was \$600.

The Cement Products Company excavated for and constructed the foundation for the house, finishing its work on May 12,—beginning the work about one week earlier,—the exact time being uncertain.

The Kissell Improvement Company conveyed lot 10657 to Charles K. Tuggle by deed dated May 24th, and received for record May 28th, 1917, at 2:15 p. m. Tuggle and wife mortgaged said premises to the Springfield Association for \$2,600, which mortgage was received for record May 28, 1917, at 2:10 p. m.

The association paid to Tuggle under said mortgage in six installments between June 8th and July 27th, a total of \$1,900. The value of the lot, unimproved was \$900.

On May 26th, 1917, the Cement Products Company staked off the foundation preparatory to excavating for the cellar and foundation, and constructing the foundation. On May 28th, 1917, said company commenced digging the cellar, beginning at about 8 o'clock. This company was paid in full for its work after completion.

The Kissell Improvement Company conveyed lot 10670 to Charles K. Tuggle, by deed dated June 12, and recorded June 18th, 1917 at 9:10 a. m. On June 15th, 1917, Tuggle mortgaged said lot to the Springfield Association for \$2,600, the mortgage being received for record June 15th, 1917, at 1:45 p. m. Said association in four installments, between June 15th and July 27th, paid to Tuggle \$1,600. The value of the lot without improvement was \$900.

The Cement Products Company finished the digging of the cellar on the 14th of June, beginning the work two or three days before,—probably on June 11th. Upon the completion of the work the Cement Company was paid in full.

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On all the lots the materials were furnished and work and labor done by various material men and laborers subsequent to giving of the mortgages, as stated above.

Under the facts stated, the following questions among others, are raised:

First:—From what date do the liens secured by the laborers and material men attach to the property.

Second:—Is the Springfield Building & Loan Association subrogated to the rights of the Provident Savings & Loan Association.

Third:—From what dates are the mortgages made to the Springfield Association liens upon the premises—from the date they were recorded, or from the date that the various different installments were paid to the owner of the property.

Fourth:—Are the mortgages to the Springfield Association to be considered as construction mortgages, with the rights, privileges and obligations provided by Section 8321-1.

Fifth:—Is there a priority among the various lien claimants having liens on any single lot.

Sixth:—As between the mortgage and the lienors, can the value of the property as improved by the erection of the buildings, be considered as to the value of the unimproved lot, and as to the value of the improvements.

Section 8310 (103 O. L., 369), provides who may have a lien, and it is provided that the same shall be a lien to the extent of the title of the owner at the time the work was commenced or materials were begun to be furnished by the contractor under the original contract.

It is urged by counsel for the building association, that the liens being only to the extent of the title of the owner at the time the work was commenced by the contractor under the original contract, that there could be no contractor entitled to a lien unless there was an original or principal contractor, and that in this case the work having been done under separate contracts with the owner with each person furnishing material or performing labor, and not with the original or principal contractor, that the

several persons contracting separately with the owner can not secure a lien under the statute as it now stands, or if he may secure such lien that the separate liens shall be liens from the date that the first labor was performed or first material was furnished under each separate contract with the owner.

The court is of the opinion there may be as many original or principal contractors as there were persons contracting with the owner for any specific part of the work. Whether their several liens shall be liens from the date of the first labor performed or material furnished under their several contracts, or shall be a lien from the first labor performed or material furnished towards the construction of the entire building, is not so clear.

Section 8321 (103 O. L., 376), provides that such liens shall be liens from the date of the first labor performed or material furnished by the contractor under the original contract, but said section further provides that if several liens be obtained by several persons upon the same job, they shall have no priority among themselves except in cases of manual labor.

It is urged on behalf of the mortgages, that the word "job" as used in the section clearly indicates a sub-division of the entire structure, and that each person having a separate contract with the owner has a separate job, and that those performing labor or furnishing material under such separate job, shall have no priority but that the several liens shall be controlled by the date of the several contracts, constituting separate jobs upon the entire structure.

There is considerable force in this argument, and it is not without judicial support. For example, it is held in the case of *Barber et al v. Reynolds*, 44 Cal., 520, that under the California lien act, where there is no written contract for the construction of the building the several liens of the material men and laborers do not relate back to the date of the commencement of the building, but each lien relates back to and takes effect on the date the particular work was commenced or material furnished for which the lien is sought to be enforced. Other cases might be cited to the same effect.

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If, however, the statutes are to be so considered it would defeat their purpose, which has always been to give to all persons contributing by their work and material to the final value of the structure the right to participate pro rata in the proceeds of their joint labor.

As far back as the case of *Choteau v. Thompson and Campbell*, 2 O. S., 114, it was held that:

“As between the lien holders there is no priority. The idea upon which the law proceeds is that the building is the result of the labor and materials of various persons. The work of some must precede that of others, but each contributes his proper share to the value of the structure; its value when finished is derived from these several contributions. The Legislature intended the money, whether arising from the rents or the sale to be distributed *pro rata*.”

The court, in spite of the fact that there are decisions to the contrary, in other states, is of the view that where liens are secured by several contractors having separate contracts with the owner for distinct parts of the same building, that the several liens obtained by said laborers and material men, shall have no priority among themselves, but that all shall participate *pro rata* in the proceeds of the sale, irrespective of the date of their separate contracts with the owner.

Having determined that there can be no priority between several lienholders contributing labor or material to the entire structure, the next question to be determined is from what date the liens shall attach.

Section 8321 further provides that the liens shall be preferred to all other titles, liens or incumbrances which may attach upon said structure, or to or upon the land upon which they are situate, which shall either be given or recorded subsequent to the commencement of said construction, excavation or improvement.

The three words, construction, excavation or improvement are intended to cover all the several different structures enumerated in detail in Section 8310.

It is urged by counsel for the mortgages that by this provision of the statute, the several liens are to be preferred only to the

incumbrances that are filed subsequent to the date of the several separate contracts with the owner under which each laborer or material man performed labor or furnished material.

The court is of the opinion, however, that it is not possible to give the words, "construction, excavation or improvement" so narrow a meaning.

It would appear to the court that the meaning of the statute is that all liens obtained, for any labor done or material furnished towards the construction of any given structure, such as the houses in question, shall be preferred to any incumbrances which are recorded subsequent to the commencement of such structure, and therefore it is necessary to determine what act was the commencement of the construction of the finished house.

It has been held in many cases that a given structure is begun where, in good faith, some laborer or material man has performed such labor or furnished such material, under a contract with the owner, as will be easily distinguished by a person examining the lot, to be the beginning of the structure.

Am. Digest, Cent. Ed. Mechanics Liens, Secs. 209, 304; Am. Digest, Dec. Ed. Mechanics Liens, Section 173; *Keer-Murray Manufacturing Co. v. Kalamazoo*, 124 Mich., 111; *Kay v. Towsley*, 113 Mich., 281.

The court is aware that many other cases might be cited to the contrary, but it appears to the court that this construction will be in harmony with the policy in reference to mechanics liens, as expressed in the Ohio statutes and enunciated in Ohio decisions.

The court therefore holds that the mechanics liens, while they have no priority among themselves, will all date back as liens to the time when the first work was begun towards the erection of the structures, upon the several lots, under contracts with the owner. The first work was begun when the excavation for the foundation and cellar was commenced.

Second.—The next question to be considered is in reference to the mortgage to the building association on lot 8834.

On February 19th, 1917, a mortgage was executed to the Provident Association by the owner, in the sum of \$2,000. On June

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6th, the owner mortgaged said lot to the Springfield Association for the sum of \$2,600, and the Springfield Association paid to the owner, \$1,325 which was immediately paid by the owner to the Provident Association, in accordance with his agreement with the Springfield Association, that it was to have a first mortgage upon said premises.

It is claimed by the Springfield Association that it was subrogated to all the rights of the Provident Association under its mortgage.

The court is of the opinion that the matter is settled by the principles laid down in *Amick v. Woodworth et al*, 58 O. S., 86, and *Straman v. Rechline et al*, 58 O. S., 443, in which cases it is held where a loan is made on an agreement that the mortgage shall be a first lien on the property, then incumbered with other liens, that are paid off out of the money loaned, which liens are so paid in order to give the lender the promised security that the lender is neither a stranger nor volunteer, and when the money is loaned under such agreement, and it is so used, and through an oversight as to other liens the money can not be made on the mortgage, the mortgagee has the right to be subrogated to the lien which was paid out of the money by him loaned.

The evidence in this case brings the transaction in reference to the Provident Association mortgage within the reasoning of these two cases, and the court is of the opinion that the Springfield Association is subrogated to all the rights of the Provident Association.

Third.—The next question raised has to do with the mortgages upon these premises to the Springfield Association.

The mortgages were given and recorded as above set out, but the payments to the owner under the mortgages were made in installments, as the work of construction progressed, the money being paid under each mortgage in from four to eight different installments.

It is claimed by the lienors that inasmuch as the money secured by the mortgages was not paid until the work progressed, that the mortgages were effective liens against the real estate only as payments were made.

This question was raised in the case of *Schaudt v. Trout*, in which case Judge Kyle held that inasmuch as the mortgagee was obligated to pay the amount of money named in the mortgage, and inasmuch as the subsequent contractors had notice of such mortgage, that the mortgage in its entirety was prior to the liens subsequently secured by the lien claimants for work performed by them before the several installments were paid.

In the case at bar, the oral testimony of the officers of the association is to the effect that it was agreed between them and the mortgagor that the money was to be paid out only as the work progressed and they would be under no obligation to pay it to the mortgagor unless he proceeded with the construction of the building.

The vacant lots were respectively valued at \$600, \$700, and two at \$900. All the mortgages were for \$2,600 so that it is evident that the building association did not rely upon the value of the vacant lots for its security and this is testified to by the officers of the association.

It has been decided in Ohio that a mortgage with a clause to secure future advances will be postponed to a lien secured prior to the making of such future advances, to the extent of such future advances. *Spader et al v. Lawler*, 17 O. S., 371; *Choteau v. Thompson*, 2 O. S., 114.

In the case of *West v. Klotz*, 37 O. S., 420, the court says, on page 427:

“It is certainly true that this court has held that where a mortgage is given to secure future advances, a subsequent mortgage will have priority over it as to any advances made after such subsequent mortgage is placed on record (citing cases above). We are not disposed to intimate any dissatisfaction with this rule.”

The court in the case of *West v. Klotz* did not find it necessary to decide whether the rule controlled in the mortgage then under consideration.

In the case at bar, while it appears that the money was to be paid out only as the work progressed, it is true that the mort-

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gagee was under obligation to pay the money to the extent of the mortgage as the structures progressed.

The true rule in reference to advances made under mortgages, seems to be that if the mortgagee is under no obligation to pay to the mortgagor the future advances, the mortgage will not be good as to liens intervening between the installments paid to the mortgagor, but if the mortgagee is obligated to pay to the mortgagor the money on the happening of a given event then the mortgage is good for the entire sum from the date of its filing.

A case of this kind is that of *Whelan v. Trust Company*, 214 Mass., 121, where it is held that if the mortgage was given to secure the successive advances that the mortgagee was bound to make under the construction loan contract with the mortgagor, in such case it is immaterial that only a very small portion of the money had been advanced when the mechanic, claiming the lien, made his contract, the court holding that the mortgage is a prior lien for the entire sum named in the mortgage.

The case of *Gray v. McClelland*, 214 Mass., 92, is a case in which a mechanic's lien is held to be superior to the subsequent payments under the mortgage for the reason that such payments were optional and not obligatory. The court is therefore of the opinion that the mortgages to the building association are liens from the date of the filing of said mortgages for the entire amount paid out under said mortgages in the several subsequent installments, the mortgagee being obligated to pay as the work progressed.

Fourth.—It is claimed by counsel for the building and loan association that these mortgages fall within the provision of Section 8321-1 (105-106 O. L., 531), which provides that a lien of a mortgage given to improve real estate, or to pay off prior incumbrances, the proceeds of which are entirely used in such improvement, or to pay off prior incumbrances, which mortgage contains the correct name of the mortgagee, together with the covenant between the mortgagee and the mortgagor, authorizing the mortgagee to do all the things provided by the mortgage to be done, shall be prior to all mechanics liens, to the extent that the

proceeds are used for the purposes, and pursuant to the section, and that such mortgage shall be a lien on the property from the time it is filed for record, for the full amount that is actually paid out under such mortgage, regardless of the time the money secured thereby is advanced.

All these building and loan mortgages are the ordinary form of building and loan mortgages in use for many years prior to the passage of this section of the statute and while they contain the correct name and address of the mortgagee, they do not contain any covenants between the mortgagee and mortgagor, authorizing the mortgagee to do the things provided in the act.

Therefore, in the opinion of the court, they are not construction mortgages, and are not entitled to all the privileges provided by said section. But while they are not strictly statutory construction mortgages, the court is of the opinion that as to any money that was paid out under these mortgages, and actually went into the payment of any laborers or material men, that to this extent the payment of money by the mortgagee should in equity be considered as applied to the claims of the lienors, and to that extent the mortgages should be subrogated to the rights of the lien holders, in as much as such lien holders were paid with money belonging to the building association.

Of course as to any money that was paid to Tuggle which did not reach the lien holders, the mortgagee would have no right.

If upon final distribution of the fund, it appears that any lien holder received a larger proportion of the money due to him by reason of the fact that he received money from the building association, to the extent of such excess so received by such lien holder by reason of such payment by the building association, the building association should have no right of subrogation.

In other words, the building association would have the right of subrogation only to the extent the payments made by it, which went to the lien holders, benefited all of the lienors.

Fifth.—The court has already held that the lien claimants have no priority among themselves on the money arising from the sale of any particular lot.

Sixth.—It is claimed by the lienors that their liens attach to

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the structure prior to the mortgage, and that there should be a finding as to the value of the property without the structures, and while as to the naked lot the mortgagee might have a first lien, as to the value of the lot enhanced by the structure placed thereon, they are entitled to first liens in accordance with the principles laid down in *Choteau v. Thompson and Campbell*, 2 O. S., 114.

The court does not believe that, under our statutes, there can be such a separation of the title to the unimproved lot and the title to the lot as enhanced in value by the improvement, as would permit this to be done.

The court believes the principles laid down will enable counsel to draw the proper entries in relation to the specific liens, and set out in the pleadings. See *Rider v. Crobaugh*, decided by Supreme Court, May 13, 1919.

LIABILITY OF CHECK ROOM PROPRIETOR FOR LOST PACKAGES.

Common Pleas Court of Franklin County.

UNION DEPOT COMPANY V. HARRY C. ULRICH.*

Decided, June 26, 1918.

Bailment—Liability for Property Left in a Package Checking Room—Not Limited by a Stipulation Printed on the Check, When—Same Rule Applies to a Depositary as to a Carrier.

Where a package is left with a bailee of packages for hire, a stipulation printed on the check given to the owner for use in claiming the

*This case was taken to the court of appeals on error, where on July 29 the following memorandum opinion was filed:

BY THE COURT:

"We have carefully considered the briefs and record in the above case and are of the opinion that the judgment should be affirmed upon the written decision of Judge Rogers.

"Judgment affirmed."

package, limiting the liability of the bailee to \$25 in case the package is lost, is not binding on a bailor whose attention was not directed to the limitation, and does not bar recovery of the value of a package which was lost.

Henderson & Burr, for plaintiff in error.

Timothy S. Hogan and Joseph L. Stanton, contra.

ROGERS, J.

Substantially the following appears from the records in this case :

The defendant in error checked his valise with the plaintiff in error, a corporation engaged in the business of acting as bailee of packages for hire, to be retained and re-delivered when called for. Upon calling for the luggage the bailee was unable to deliver the same to the bailor, having already delivered the package to a stranger without the bailor's consent. Thereupon the bailor sued the bailee in the municipal court of this city for the value of the articles contained in the package, \$167.50. The defendant below at the time he received the package delivered to the plaintiff, or rather to his wife, a check or ticket termed a "Package room check," on the one side of which were these words: "See conditions on back," and on the other side were these words: "The person accepting this check hereby agrees, in consideration of the low rate at which it is issued, that no claim in excess of \$25 shall be made against the Union Depot Company for the loss of, or injury to, any package, valise or other article which may be deposited with it for which this check has been issued." The attention of the plaintiff's wife was not called to the printed matter on the check nor did she observe its contents. The case was heard on an agreed statement of facts substantially as above given, and the restrictive liability as recited in the ticket was pleaded by the defendant and relied on as a defense. The court rendered judgment in favor of the plaintiff for the full amount claimed. Error is prosecuted to this judgment and the main question is as to whether the plaintiff was entitled to recover not to exceed \$25 with his costs, and that the judgment was excessive.

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The principal question is as to whether the circumstances as disclosed by the undisputed facts show that there was an agreement whereby defendant's liability, in case of loss, was to be restricted to \$25. In other words, whether the restrictive clause in the ticket or check delivered to the wife of the plaintiff, without anything having been said by either party with regard to the terms of the bailment or the contents of the ticket, or any notice taken of it by the wife, became a part of their agreement of bailment so as to limit the liability to \$25 in case of loss of the valise.

Two views diametrically opposed to each other have been taken by courts on this question. In *Terry v. Southern Railway Company*, 81 S. C., 289, it is in effect held that the bailee may limit its liability by such a provision on a check or ticket delivered to the bailor. Whereas in *Healy v. N. Y. Cent. Ry. Co.*, 153 App. Div., 516, 138 N. P. Supp., 287, affirmed in 210 N. Y., 646, without opinion, the contrary is held to be the law. Moreover, in Ohio in *Railroad Company v. Campbell*, 36 O. S., 647, it is held that,

“Words on a railroad ticket or baggage check limiting the liability of carrier to a specific amount for loss of baggage, are not binding on the passenger, unless, with knowledge of such limitations, he agrees to it.”

Apparently in the above case by the restrictive provisions it was contemplated only to affect the amount of liability, in case the carrier was liable under the law, and not to limit the carrier's common law liability itself, or deprive the passenger of any legal ground of recovery theretofore existing in his favor, in case of loss. So in the instant case the object of the provision on the ticket was not to take away any ground of recovery vouchsafed by the common law to the depositor, in case of loss, but only to limit the maximum amount recoverable. The effect of the stipulation was intended merely to liquidate the damages, and leave the right to recover damages undisturbed. In the case of the carrier as well as of the depositary, the object of the restriction is the same in both, namely, to effect an agree-

ment beforehand as to the amount of damages recoverable in case of loss or injury to the bailment. Hence, if such an agreement is not effected in case of the carrier by the mere delivery of the ticket and baggage check containing the limitations, unless with knowledge of the limitations the passenger agrees thereto, I see no reason for holding that such an agreement subsists between the depositor of the article and the depositary by the mere delivery of the check by the latter to the former containing the limitation printed thereon although the depositor's attention is not called to the matter nor apparently does he assent thereto. The case of the carrier and the depositary is that of bailment, the one known in the law as *locatio operis mercium rebandarum*, and the other *locatio custodiae*. The only difference between them in the matter of liability is the difference in the care to be exercised by each. I see no reason to lay down one principle of law governing the liability in the one kind of bailment as to what shall constitute an agreement as between bailor and bailee, and another principle governing the bailor and bailee in the other kind of bailment. One of the fundamentals of our jurisprudence is to bring about uniformity in decisions, and not to have one rule to govern in one case and another rule to govern in another case of a same or similar character.

Accordingly I find no error in the proceedings and judgment of the municipal court, and the same is affirmed with costs and the case remanded. Exceptions.

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**ACTION FOR RECOVERY OF UNEARNED PORTION OF
ATTORNEY'S FEE.**

Court of Common Pleas of Hamilton County.

AMALIA M. BOLDT, PLAINTIFF, v. THORNE BAKER ET AL,
DEFENDANTS.

Decided, April Term, 1919.

*Attorney and Client—Contract of Employment of Attorney Terminates,
When—Fee in a Divorce Proceedings Agreed upon and Paid in
Advance—Action Dismissed by Opposite Party and Contemplated
Services Performed in Part only—Action to Recover Amount of
Fee Paid in Excess of Services Rendered.*

1. The employment of an attorney on behalf of the plaintiff to prosecute an alimony case presumptively terminates upon the entering of the final decree, and thereafter the relation of attorney and client no longer exists.
2. The unexplained act of a former client, in taking a letter setting forth terms of an agreement to her former attorney, does not prove the existence of the relation of attorney and client at that time, and much less does it furnish any evidence of the existence of the relation at a subsequent time. To hold that it was evidence would be to predicate inference upon inference which is not permissible.
3. An attorney was employed by written agreement by a defendant "as my attorney" in a divorce case, and was paid in advance "for the same." After the attorney had prepared and filed an answer, represented his client in the taking of a deposition, and performed other services extending over a period of nine months, the plaintiff dismissed the case. In an action by the client to recover a portion of the fee claimed to have been unearned, *Held*: that the contract fixed the rights of the parties and that as the attorney had fully performed the service required of him by the terms of the contract, no part of the money paid could be recovered, notwithstanding less labor was performed than would have been performed had there been a trial of the divorce case upon its merits.

Harmon, Colston, Goldsmith & Hoadly, for Plaintiff.

John C. Healy, Thorne Baker and C. W. Baker, for Defendants.

MATTHEWS, J.

This cause now comes before the court upon the motion of the plaintiff for a new trial. The court at the close of plaintiff's evidence instructed a verdict for the defendants, and the plaintiff's motion for a new trial now brings under review the question of the correctness of that ruling.

As the court said upon passing on the defendants' motion for an instructed verdict, the action of the plaintiff, as alleged in her amended petition, is one upon an implied or *quasi* contract based upon the theory that the defendants, as executors and executrix of the last will and testament of Charles W. Baker, deceased, have money which in equity and good conscience belongs to the plaintiff, and that the law affords her a remedy against them as though they had agreed to repay it.

The plaintiff's action, as alleged in her amended petition, is one which under the common law system of pleading would be denominated an action upon the common counts for money had and received. Her claim that the defendants have been unjustly enriched at her expense is based upon two contentions:

First—That she was a client of Charles W. Baker, attorney, prior to and on the 31st day of October, 1912, and that on that date she paid him \$4,000 to represent her as her attorney in a certain divorce case filed against her by Charles Boldt in the Court of Common Pleas of Hamilton county, Ohio; that she paid said money to the said Baker because of the influence which he had acquired over her by virtue of his having been her attorney in a certain alimony case previously instituted and prosecuted by her; that said sum of \$4,000 was exorbitant and excessive, and out of proportion to the services rendered by the said Charles W. Baker in said divorce case, and that because of the rule of law which requires the dealings between attorney and client to be conducted with the utmost good faith on the part of the attorney and to be fair and equitable to the client, she is entitled to have returned to her said sum of \$4,000, less reasonable compensation for the services rendered by the said Baker in said divorce case, which she fixes at \$250, leaving a balance of \$3,750 claimed by her.

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Second.—The second ground upon which the plaintiff bases her claim of unjust enrichment is, that at the time she employed Mr. Baker as her attorney in the divorce case on October 31, 1912, it was contemplated by both parties that said divorce case would be tried to a conclusion upon its merits; that the plaintiff in said divorce case dismissed the same without any collusion with her, and that inasmuch as the said divorce case did not come to a trial because of said dismissal there was a failure on the part of the said Baker to perform all the services that were within the contemplation of the parties at the time the contract was made, and that therefore she is entitled by implication of law to recover the amount she had paid for the services contemplated but not performed, the amount of which she places at \$3.750.

The court will discuss these two grounds upon which the plaintiff claims a right of recovery in the order stated.

First.—The evidence shows that in 1909 the plaintiff in the case at bar instituted an action for alimony against her husband, Charles Boldt, and employed Charles W. Baker to represent her as attorney in that case. That alimony case was tried in the Court of Insolvency of this county, and after judgment was appealed to the Circuit Court of this county, and while the case was there pending the matters involved therein were adjusted between the parties by a separation contract dated December 12, 1911, and this separation contract was incorporated in the final decree in the Circuit Court, and the court, in conformity to the separation contract, decreed that Charles Boldt, the plaintiff's husband, should pay alimony to her as follows: \$3,500 in cash, out of which she was to pay her attorney's fees; all the household furniture to belong to plaintiff; the right to occupy the family residence during her natural life; defendant obligated to pay the ground rent and taxes, and in addition thereto the defendant was ordered to pay to the plaintiff during her natural life, the sum of \$5,000 per annum payable in monthly installments.

This decree was entered on December 14, 1911. An allowance of \$250 on account of attorney's fee had been ordered paid to

Charles W. Baker by the Court of Insolvency, and upon the plaintiff receiving the cash payment of \$3,500 she paid that to him upon his fee, making a total of \$3,750. paid to him for services in her alimony case.

After December 14, 1911, the only evidence which it is claimed shows a continuance of the relation of attorney and client between Charles W. Baker and Mrs. Boldt, is a letter dated August 19, 1912, addressed to Mr. Baker by Charles Boldt, and delivered to Mrs. Boldt, who in turn delivered it to Mr. Baker. The letter is as follows:

“I am pleased to inform you that Mrs. Boldt and I have effected a reconciliation, and that I will continue to pay her an allowance of \$5,000 a year under all circumstances. This allowance is for her own personal use, and I am to pay all household expenses. I shall transfer to her the leasehold on our home, but will assume the payment of ground rent and taxes.”

This letter was written at the solicitation of Mrs. Boldt, and so far as the evidence discloses, without any participation therein by Mr. Baker.

The other item of evidence which it is claimed shows a continuance of the relation of attorney and client between Mr. Baker and Mrs. Boldt, is a bill for \$1,000 for professional services rendered by Mr. Baker on October 2, 1912, to Mrs. Boldt, and a letter sent at Mr. Baker's direction on October 11, 1912, requesting her to pay the bill. Mrs. Boldt did not pay this bill for the reason that, as she claimed, there was no basis for the charge, and it doesn't appear in evidence what services were rendered by Mr. Baker as the predicate for this charge of \$1,000.

From October 11, 1912, to October 31, 1912, the evidence does not disclose any dealings between Mr. Baker and Mrs. Boldt of any sort whatsoever.

The reconciliation that had been effected between Mr. and Mrs. Boldt not having proven satisfactory for some reason, on October 29, 1912, Mr. Boldt instituted an action for divorce against Mrs. Boldt in the Court of Common Pleas of this county, and on October 31, 1912, Mrs. Boldt repaired to Mr. Baker's

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office and then and there employed him to represent her in the defense of said divorce case, and paid him the \$4,000 at the inception of that employment, and it is that \$4,000 less a reasonable compensation for the services rendered by Mr. Baker on her behalf in that divorce case, the exact amount to be fixed by the jury, that she now seeks to recover.

At the outset of the consideration of this phase of the case, the question is, whether at the time Mrs. Boldt paid to Mr. Baker the \$4,000 in question the relation of attorney and client then existed. So far as the evidence discloses, Mr. Baker was employed by Mrs. Boldt with reference to one specific case, and that was the alimony case which Mrs. Boldt instituted in 1909 and which was terminated by final decree of the Circuit Court on December 14, 1911.

Did the entering of the final decree in that case terminate the status of attorney and client? In the case of *Newkirk v. Stevens*, 152 N. C., 498, it was held:

“The termination of the relationship of attorney and client depends upon the facts and circumstances, and nature of the attorney’s employment, and the retainer he had received, and as a general rule, and in the absence of special circumstances to the contrary, the authority ceases with the termination of the suit for which his services are engaged.”

There are many authorities cited in the foregoing case in support of the principle of law upon which the court decided the case.

In *Thornton on Attorneys at Law*, Volume 1, Section 142, the rule of law on this subject is stated in this language:

“The relation of attorney and client is terminated by the accomplishment of the purpose for which it was created, and no act of the attorney can bind his client thereafter. * * * So, where an attorney is employed to contest a will, his employment ceases on the withdrawal of the objections, with his client’s consent, to the entry of a decree admitting the will to probate. The relation is also terminated when the matter in dispute has been settled. * * * When counsel has been retained to conduct litigation his authority to represent his client therein ceases with

the termination of such litigation. The question of what amounts to a termination however remains, and as to that the authorities differ. *The general rule undoubtedly is that in the absence of an agreement to the contrary, litigation is so far terminated by the entry of a final judgment therein, as to put an end to the authority of counsel with respect thereto.*"

In the annotation to the text on page 252, the author says:

"It has been held that in actions for alimony or for divorce and alimony, the authority of the plaintiff's attorney terminates with the entry of judgment;" citing *Calamanowitz v. Calamanowitz*, 95 N. Y. Sup., 627; *Conklin v. Conklin*, 99 N. Y. Sup., 310.

The conclusion to which the court has arrived on this subject is that the evidence discloses that Mr. Baker's original employment was in connection with the prosecution of the alimony case, and that upon the entering of the final decree in that case on December 14, 1911, the relation of attorney and client terminated.

It is claimed, however, that the letter which Charles Boldt wrote to Mr. Baker on August 19, 1912, at the request of Mrs. Boldt, shows that the relation of attorney and client then existed, or at least that it is an item of evidence from which the jury might infer the existence of that relation at that time. The court does not take that view of this letter in connection with the evidence.

It appears that this letter was written upon the demand of Mrs. Boldt, and that Mr. Baker had nothing to do with it. She exacted the letter from Mr. Boldt as a condition of reconciliation with him. It was for her individual purposes, and the fact that she secured this expression from Mr. Boldt in the form of a letter to Mr. Baker could not reconstitute Mr. Baker her attorney without some sanction on the part of Mr. Baker. The relation of attorney and client, when once terminated, could only be re-established by mutual consent of the attorney and client.

It is also claimed that the bill rendered by Mr. Baker on October 2d, and the letter requesting its payment upon October 11th, 1912, are some evidence that the relation of attorney and client existed at that time. The court can readily see that the rendition

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of that bill for \$1,000 is proof that the relation of attorney and client had existed at some prior time, but is unable to perceive that it has any probative force as to the existence of the relation at the time the bill was rendered, or of the continuance of that relation after said bill was rendered, and the court is therefore of the opinion that the evidence fails to disclose that when Mrs. Boldt went to Mr. Baker on October 31st, 1912, that she went to him because of a relationship of attorney and client then existing. There was no proof of any pending unfinished business which had been confided to Mr. Baker that would have required him to continue to act as attorney for Mrs. Boldt between October 11th and October 31st, 1912. The letter of August 19th, the bill of October 2d, and the letter of October 11th, certainly can not be said to be direct evidence even of the existence of the relation on those dates. At most, those items of evidence only give rise to an inference which the jury might or might not draw of the existence of the relation not later than October 19th. To draw that inference and then to draw the further inference that the relation continued to and existed on October 31st, would be building inference upon inference, which the law does not permit.

This well settled principle is stated in *Ruling Case Law*, Volume 10, page 870, in this language:

“It is a well-established rule that a presumption can be legally indulged only when the facts from which the presumption arises are proved by direct evidence, and that one presumption can not be deduced from another. To hold that a fact inferred or presumed at once becomes an established fact, for the purpose of serving as a base for a further inference or presumption, would be to spin out the chain of presumption into the region of the barest conjecture.”

Speaking on this subject, the Supreme Court of the United States, in *United States v. Ross*, 92 U. S., 281, said:

“They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissi-

ble. No inference of fact or law is reliable drawn from premises which are uncertain.”

For a discussion of this entire subject see *Atchison, Topeka & Santa Fe Ry. Co. v. Baumgarten*, 10 Ann. Cases, 1094, and note on 1097.

If the relation of attorney and client existed between October 11th and October 31st, of necessity there must have been a subject matter to which it related. There was no proof of any matter in connection with which Mr. Baker had been employed, and the court is of the opinion there was no evidence to submit to the jury on this subject.

The court therefore holds on this branch of the case, that on October 31st, 1912, when Mrs. Boldt bargained with Mr. Baker for his employment to defend her in the divorce case, the parties dealt with one another upon an equal basis, and not upon the basis of a client dealing with the attorney during the relationship, and that the cases cited establishing the law applicable to dealings between attorney and client during the relationship are inapplicable to the facts in this case.

It is claimed, however, that even assuming that the relationship of attorney and client had ceased prior to October 31st, 1912, that the influence of the attorney continued, and that that, under the authorities, makes the law relating to dealings between an attorney and his client applicable to the facts in this case.

In view of the court, not only had the relation of attorney and client ceased prior to October 31st, 1912, but also the influence.

It appeared in evidence that Mrs. Boldt had paid Mr. Baker \$3,750 for his services in the alimony case, and that he had rendered a bill for an additional \$1,000 for services rendered, and this amount she had failed to pay because, in her opinion, it was excessive and exorbitant. The fact of her declination to pay shows that a dispute existed between Mrs. Boldt and Mr. Baker on this subject of fees, and that therefore when she came to Mr. Baker on October 31st, 1912, to employ him, Mr. Baker's opinion of the value of his professional services was not a controlling factor with her.

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Mrs. Boldt and Mr. Baker entered into a written contract for his employment to represent her in the divorce case. This contract is dated October 31, 1912, and is couched in this language:

"Mrs. Amalia M. Boldt has this day employed C. W. Baker as her attorney in the case of Boldt versus Boldt, No. 151955 Court of Common Pleas.

"She now pays him for the same, and for amount \$1,000 heretofore due, \$5,000. If the Court in case No. 151,955 makes any allowance for fees such allowances are to be turned over by Mr. Baker to her. Signed, Charles W. Baker. Signed, Amalia M. Boldt."

It is claimed by the plaintiff in this case that by the language of this contract taken in conjunction with its legal intendments, Mr. Baker was employed not only to prepare the case of Boldt against Boldt for trial, but to actually try the case, and that inasmuch as the divorce action was dismissed by the plaintiff and no trial took place, there was a service contemplated by the contract but not performed by Mr. Baker, and that therefore, after paying Mr. Baker the reasonable value of his services rendered, Mrs. Boldt is entitled to recover the balance of the \$4,000.

The construction which the court places upon this contract is that it bound Mr. Baker to represent Mrs. Boldt in all stages of the case of *Boldt v. Boldt*, and to perform all the professional services required on her behalf, with reasonable skill and diligence. The language of the contract is that Mrs. Boldt *employed* Mr. Baker as her attorney in the *case*, and now pays him for the *same*. The parties were dealing with reference to a pending action. Can it be said that Mr. Baker's right to retain this fee depended, under this contract, upon the course that the case took and its ultimate disposition? In the opinion of the court the transaction between the parties does not bear that construction. No one could determine in advance what course the case would take. It was a suit for divorce, and inasmuch as the plaintiff in that case was a man of considerable fortune and inasmuch as this prior separation agreement had bestowed valuable rights on the defendant in that case, it was extremely likely that property rights would become involved and have to be deter-

mined. Mrs. Boldt was familiar with the control that parties had over litigation, for the reason that the prior alimony case had been settled by agreement between the parties. While parties to a divorce case can not agree to a divorce decree, still, the plaintiff having instituted the divorce case, has it in his power to dismiss it, and inasmuch as Mrs. Boldt regarded the continuance of the marital relation as a matter of importance to her (and it might well be, both from a property standpoint as well as from a sentimental standpoint), the dismissal of the case by the plaintiff, no matter from what reason, was securing to her all she could hope to get from the divorce case.

The court is of the opinion that when Mr. Baker represented Mrs. Boldt as her attorney in the case of *Boldt v. Boldt*, from the time of his employment as long as and until the case was dismissed, he performed all the services called for by the contract. It was inevitable that *Boldt v. Boldt* should be terminated in some way. A trial on the merits was just one way. Mr. Baker was employed to defend the marital relation existing between Mr. and Mrs. Boldt against the assault made by Mr. Boldt, in the divorce case. He did defend the marital relation on Mrs. Boldt's behalf against this assault for a period of more than nine months. Mr. Boldt dismissed his case, the assault ceased, and Mr. Baker's term of service as Mrs. Boldt's attorney came to a natural termination by limitation by reason of the completion of the task for which he was employed. It was not a termination of the employment in advance of its natural termination, by the happening of an unforeseen contingency.

In the answer filed by Mr. Baker on behalf of Mrs. Boldt, in the divorce case, among other things he suggested that the plaintiff was not a resident of Ohio. If the court had found upon the evidence that the plaintiff was not a resident of Ohio for one year next preceding the filing of the petition for divorce, it would on motion of the defendant or upon its own motion, have dismissed the action for divorce. That would have been a termination of the divorce case other than upon its merits, and would have been a termination suggested by Mrs. Boldt in her answer. Certainly under that situation it could not be claimed that there

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should be restitution of all or any part of the fee paid, and the court sees no distinction between that situation and the situation disclosed by the evidence in the case that the plaintiff, after prosecuting the divorce case for a period of nine months, determined to and did dismiss the action. Legally the same result ensued. The parties to the case were restored to their original position as though no suit had ever been filed, and the entry of dismissal would not have been a bar to any subsequent action.

Assuming, however, that the court is wrong in its construction of this contract, and that it contemplated a service which was paid for but which was not performed by Mr. Baker, can there be a recovery under the circumstances of this case? The evidence shows, even on this hypothesis, the failure of consideration was only partial. Professional services were rendered, but according to the plaintiff, full performance was not rendered because the plaintiff in the divorce case dismissed it, and thereby rendered full performance by Mr. Baker impossible. This resulted from no fault of either Mr. Baker or Mrs. Boldt. The rights of the parties under such circumstances are discussed in *Keener on Quasi Contracts*, page 292, and succeeding pages. We quote from page 292:—

“Accordingly a defendant, who has failed to perform a contract because of the impossibility of performance, must, if the failure of consideration resulting therefrom is total, or if partial only, is *apportionable*, compensate the plaintiff for benefits received.”

Where recovery is permitted it is upon equitable grounds, and if there has been part performance and the consideration is not divisible, recovery is not permitted where inequity would be done to the defendant.

In the case of *Stevens v. Cushing*, 1 N. H., 17, the defendant had shipped as a seaman on board a privateer on a cruise to continue not more than 100 nor less than 90 days. He sold the plaintiff one-fourth part of his share in said cruise for the sum of \$50 which was paid to him at the time of sale. The privateer returned to port after cruising about 25 days. The defendant's

share in the prize money amounted to \$12, and he left one-fourth of it in the hands of the prize agent for the plaintiff, to whom he had assigned for \$50 a one-fourth interest in his share of the prize money. The plaintiff sued to recover the \$50 paid as for money had and received. The court held there could be no recovery. On page 18, the court said:

“Where money is paid upon a contract which is executory on the part of him who has received the money, and he altogether fails of performing the contract, the injured party has an election either to bring an action on the contract to recover damages for the non-performance, or to consider the contract as rescinded, and recover back the money so paid, as money had and received to his use. In such case the law presumes the assent of him who received the money to the dissolution of the contract; and thereupon raises a promise to repay the money so received without consideration. *Contracts are considered as rescinded by inference of law only when the contract is entire and wholly unexecuted; if executed in part, the party injured must resort to an action on his contract to recover damages for the non-performance.*”

In the case of *DeMontague v. Bacharach*, 181 Mass., 256, it was held:

“One who has enjoyed for ten months the privilege of conducting a restaurant in connection with the bar room of another under an agreement with the proprietor of the bar room giving him such privilege for two years, if the proprietor turns him out in violation of the agreement, can not rescind the contract and recover back the payments made under it, because he can not return the benefits he has received.”

At page 260, the court says:

“The second ground on which the plaintiff seeks to keep his verdict is that on the breach of the contract by the defendants, he was entitled to rescind the contract, and recover from the defendants what he paid under it. But, as was said in *Handforth v. Jackson*, 150 Mass., 149, 154, in case a plaintiff wishes to rescind the defendant is ‘entitled to have his property restored to him, not to have its value fixed by a jury,’ and it is settled that a

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plaintiff cannot rescind a contract on the defendant committing a breach of it, without putting the defendant in *statu quo*."

The plaintiff's action is based upon equitable grounds. The remedy would only be accorded to her in the event it could be done without injustice to the defendants, and even assuming a partial failure of consideration based on the impossibility of performance, to accord to the plaintiff this remedy for restitution, and require the defendants to prove or attempt to prove the reasonable value of the services rendered by Mr. Baker, or their value as compared with the total services for which he was to be paid, \$4,000, would be an injustice, and a result which it was intended to avoid by the entering into this written agreement and the requirement of payment in advance. It seems to the court it would be particularly inequitable in this case, where the plaintiff delayed three years and until after Mr. Baker's death before making any demand for restitution.

In conclusion, the court considers that this is a case where a litigant went to an attorney to employ him to represent her in a divorce case; that no confidential relation existed between them at the time, and that the attorney had a right to place his own standard of value upon his services; that the rule of law in *Carlton v. Dustin*, 10 Weekly Law Bulletin, 294 at 296, applies, and that rule is:

"The rule of law is that where the relations of attorney and client do not exist, where there has been no such employment, where the parties deal at arm's length and neither requires the protection of the court, they may make such contract as they see fit. A man may put his own estimate upon the value of his services. He may say he will not be employed as an attorney or in any other capacity except upon the terms he sees fit."

The court is of the opinion that in view of the fact that Mrs. Boldt paid Mr. Baker \$3,750 for his services in the alimony case, and had received a bill for \$1,000 additional, Mrs. Boldt knew of the estimate which Mr. Baker placed upon his services at the time she went to him, and must have contemplated paying him a fee conforming to the prior estimate, that the requirement of the payment of the fee in advance, no matter for what reason,

was entirely lawful and may have been caused by the fact that while Mrs. Boldt had property in the form of an alimony allowance, bonds, and a life estate in some real estate, still it was not of such a character as to be easily reached on execution, and also because Mr. Baker knew that she had agreed in the alimony case not to ask for any attorney's fees in future cases, and that this decree in the alimony case on that and other subjects might be held to be valid. That the services rendered were less than might have been required of Mr. Baker had the case taken another turn is not ground for giving the plaintiff relief in this action. *Moss v. Ritchie*, 50 Mo. App., 75; *Pennington v. Nave*, 15 Ind., 323.

Entertaining the views heretofore expressed, it follows that the court is of the opinion that the motion for a new trial should be overruled, and it is so ordered.

MOTORCYCLIST RUN DOWN BY FIRE APPARATUS.

Common Pleas Court of Clark County.

BESSIE P. EAGLE, ADMX., v. THE CITY OF SPRINGFIELD, OHIO.

Decided, July 3, 1919.

*Negligence—Driver of a Fire Truck may be Guilty of—Without Rendering the Municipality Liable—Suggested Modification of Supreme Court Holdings.**

Stafford & Arthur and Hagan & Hagan, for plaintiff.

Elza McKee, for city.

*On July 8, 1919, since the above opinion was rendered, the Supreme Court rendered a decision in the case of *Fowler, Admr., v. City of Cleveland*, overruling *Frederick v. City of Columbus*, and holding that the city is liable for the negligent act of the driver of a fire truck.

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Eagle, Admx., v. Springfield.

GEIGER, J.

The plaintiff in her amended petition seeks a recovery against the city for the alleged wrongful act of the employee of the city, who was at the time in the course of his duty driving a fire truck for the purpose of testing it. The allegations of the petition as to negligence are, briefly, that the driver of the truck violated certain city ordinances in turning from his right hand side to the left hand side of the street, so that the plaintiff's decedent approaching on his right hand side was compelled to turn to the left hand to void the approaching fire machine and that as he approached the driver of the truck turned to his right and came in collision with the motorcycle driven by plaintiff's decedent, who was thrown under the fire truck and dragged a certain distance and killed.

To this amended petition a demurrer is filed. The question is presented as to whether or not in the state of Ohio there can be a recovery by one injured by the servants of the city who are engaged in driving fire apparatus either to a fire or for some other lawful and proper purpose.

Many cases have been cited by counsel for both plaintiff and defendant and many very cogent reasons why the city should be held responsible have been advanced.

Personally, I have always been out of sympathy with the holdings of the courts of Ohio that a city is not responsible for the negligent acts of firemen, and in a recent case of *Rees v. City of Springfield*, decided January 6, 1919, refused to extend the doctrine announced in relation to fire apparatus to the operation, by the city, of garbage trucks.

Counsel for the plaintiff insist that it is high time that the principles heretofore announced by the Supreme Court should be overruled, or at least so distinguished as to permit a recovery in a case similar to the one at bar.

The court has confined his attention to the Ohio decisions, not deeming it of any value to go into decisions outside of the state of Ohio. Upon careful analysis of the cases in Ohio, which are noted below, the court can come to but one conclusion; that under the law of Ohio, as announced by the Supreme Court,

a city can not be held liable for the negligent act of the driver of a fire machine.

It is not a question as to whether the driver was negligent. He may well have been negligent by the violation of certain city ordinances or state statutes, but the question is whether or not the city is responsible for the result of such negligence.

Counsel for plaintiff insist that some of the cases enumerated below were decided many years ago and that the modern tendency is against the principles therein announced. Conceding this to be true, this court does not feel at liberty to override what appears to be a clear decision of the Supreme Court of the state. Such a result must be obtained either through legislative enactment or by a reversal of the cases by the Supreme Court.

See: *Western College v. Cleveland*, 12 O. S., 375; *Wheeler v. Cincinnati*, 19 O. S., 19; *Cincinnati v. Cameron*, 33 O. S., 336; *Toledo v. Coen*, 41 O. S., 149; *Robinson v. Greenville*, 42 O. S., 625; *Frederick v. City of Columbus*, 58 O. S., 538; *Bell v. Cincinnati*, 80 O. S., 1.

Demurrer sustained.

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CONTEST OF THE WILL OF A WIFE.

Common Pleas Court of Franklin County.

ROBERT SINGER V. EDWARD D. HOWARD, EXECUTOR, ET AL.

Decided, June 23, 1919.

Wills—Contest of—Effect of Order of Probate—Burden of Proof—What It Means in Law to be of Sound Mind and Memory—Weakness of Mind and Memory Not a Disqualification, Unless—Erroneous and Unjust Notions as Exhibited in a Will not Ground for Setting it Aside Unless Indicative of Mental Incapacity—Opinion Evidence as Distinguished from the Evidence of Facts.

Instructions to the jury in an action to contest the will of a wife in which without cause for so doing she sought to disinherit her husband.

The action was one by a husband to contest the last will and testament of his wife, upon the ground of want of mental capacity. The testatrix was in the fifty-ninth year of her age, and the will was made in her last illness, a few days before her death. The will was a most unusual and unnatural one. There were no children of the marriage. The only near relatives of the testatrix were a brother and his three sons, with whom she was not on good terms. The estate, of the value of about \$25,000, was largely the result of the earnings of the husband. It consisted of a residence property in the city of Columbus, worth about \$7,000, and the balance in cash, certificates of deposit in building and loan associations and stocks in corporations, all in the name of the testatrix. By the will, the husband was given only a life estate in the residence, and the balance of the estate was distributed among various churches, charities and a large number of individuals, some of whom were mere acquaintances. The evidence disclosed a hereditary taint of insanity in the family of the testatrix. In her later years she exhibited eccentricities, and nursed a purpose, concealed from her husband, of

disinheriting him, although without reason, for his devotion and attention to her, through their married life of thirty-four years, were exemplary. The evidence showed that she had considerable business ability, in taking care of the husband's earnings, and otherwise, and in the ordinary walks of life she appeared sane and normal.

Geo. B. Okey and James A. Allen, for plaintiff.

Edward D. Howard and E. O. Osterland, for defendants.

ROGERS, J., gave the following charge to the jury:

Gentlemen of the Jury:

The Court will now instruct you with regard to the law to be applied by you in the determination of the issues in this case. The ultimate and main question of fact for your determination is this:

Is or is not the paper writing purporting to be the will and codicil of Hattie E. Singer, deceased, her last will and testament? And included within the foregoing question and upon which the solution of the main question of fact depends is this question, namely: Was or was not Hattie E. Singer at the time she executed the paper writing purporting to be her will and codicil of sound mind and memory?

The statute of this state declares in substance, among other things, that a person of sound mind and memory may give and bequeath his or her property by last will and testament, legally executed. If, therefore, you determine, under the instructions of the Court and from the evidence adduced, that Hattie E. Singer, at the time she executed the instrument in question was of sound mind and memory, it will be your duty to return a verdict that the paper writing purporting to be her will and codicil is her last will and testament. On the other hand, if you determine that at such time she did not possess a sound mind and memory within the meaning of the law and under the evidence adduced, it will be your duty to return a verdict that the said paper writing was not her last will and testament and codicil thereto.

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The statute of this state also declares, in substance, that on the trial of the issue as to whether the will is or is not the will of the testator, the order of probate shall be *prima facie* evidence of the validity of the will. Hence, upon the introduction, by the contestees, in evidence of the order of probate made by the probate court of this county, of the paper writing marked "Exhibit A.," that fact is *prima facie* evidence that the alleged will and codicil are valid, and raises the presumption that the will and codicil so probated is the valid last will and testament of Hattie E. Singer; and the burden of proof rests upon the contestants, that is, the parties attacking the validity of the will and codicil, and the duty devolves upon them to prove to you by a preponderance of the evidence, that is, by the greater weight of the evidence, that the alleged will and codicil so probated are not the last will and testament and codicil of the decedent. And in this connection the court instructs you that before you will be warranted in returning a verdict setting aside the alleged will and codicil, you must be able to find on the question submitted to you, that the evidence adduced by the contestants outweighs both the evidence adduced by the contestees, and the presumption arising from the order of the probate court admitting the said will and codicil to probate as the valid last will and testament of the decedent. However, if on said question, the evidence adduced by the contestants outweighs both the evidence adduced by the contestees and the presumption arising from said order of probate, it will be your duty to return a verdict setting aside said alleged will and codicil.

Relative to the question of the decedent's testamentary capacity, the court instructs you, as hertofore indicated, that in order to render the will and codicil valid, Hattie E. Singer must have been, at the time she signed the alleged will and codicil, of sound mind and memory. To be of sound mind and memory, as understood in law, it was sufficient if Hattie E. Singer, at the time understood the nature of the business in which she was then engaged, comprehended generally the nature and extent of her property, was able to hold in her mind the names and identity of those who have natural claims upon her bounty, and was

able to appreciate her relations to the members of her family. The law does not undertake to test by any specific method a person's intelligence, and to define the exact quality of mind and memory which a person must possess in order to make a valid will, and his or her mental capacity is not to be measured by any exclusive test of capacity to do any other particular act or business; but her mental capacity with reference to other acts and business transactions shall be considered by you in determining the question before you.

To be incapacitated to make a will, it is not necessary that the testatrix be shown to have been technically insane. Weakness of intellect or loss of memory, whether occasioned by disease or bodily suffering or infirmity, or all or some of those combined, may render the testatrix incapable of making a will, providing such weakness of intellect, or loss of memory, really and in fact disqualified her from knowing and appreciating the effect and consequences of her act and of fairly considering and weighing the just deserts of all the natural objects of her bounty.

Weakness of mind and memory will not disqualify her from disposing of her property by will, unless such weakness goes to the extent of rendering her incapable of understanding the nature of the business in which she was then engaged, or of comprehending generally the nature and extent of her property, or of recalling her relatives and others who might be the natural objects of her bounty, and keeping them in mind sufficiently to make a rational disposition of her property with respect to them.

It is claimed by the contestant that the testatrix, at the time of the execution of the will and codicil in question, was afflicted with insane delusions, especially with regard to her husband, in the way of unnatural and morbid aversion for him, mentally incapacitating her to make a valid will. This is refuted by the contestees. Whether any such insane delusions did or did not exist are matters for your determination from the evidence, and not for the court. However, the court instructs you, that if at the time the document in question was executed by the decedent the testatrix was laboring under any insane delusions in regard to her husband and the reasonable and proper

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disposition of her property to him, and she was influenced and controlled by such delusions in the making of the will and codicil, you will be justified in finding that she was not of sound mind and that her will and codicil are not valid. On the other hand, if her attitude toward him or any notions which she may have entertained, at the time of the execution of the instrument in question, with respect to her husband and his deserts and claims upon her bounty, and her making of the will and codicil in consequence, were not the result of any insane delusions or disordered mind, and she was otherwise mentally capable to make a will, you will not be warranted in setting the paper writing aside, as invalid, however erroneous or unjust her said notions of him may have been, although any erroneous or unjust notions of hers, if any, in this behalf may be considered by you as reflecting upon the question of her mental incapacity.

Applying the instructions and the evidence adduced to the question before you, did the decedent at the time she signed the will and codicil in question, and the same was attested by the witnesses, have sufficient capacity to make the alleged will and codicil? If you resolve this question in the affirmative, you will be justified in finding that the paper writing is the last will and testament of the decedent. On the other hand, if you resolve this question in the negative, it will be your duty to find that the paper writing is not the last will and testatment of the decedent.

A class of witnesses, both expert and lay, was introduced by the parties, who, besides testifying to facts in the case, were permitted to give their opinions reflecting upon the soundness or unsoundness of mind of the decedent, and her mental capacity to make a will. This is what is called "opinion evidence" as distinguished from evidence of facts, and is predicated upon facts which are the foundation for the opinions. Now the court instructs you that such opinion evidence does not tend to prove any facts upon which the opinions are based; and further it is incumbent upon the respective parties, calling the witnesses who have given their opinions, to establish by a preponderance of the evidence the facts which are the premises or bases for the

opinions and included in the questions put to such witnesses; for, if the premises or bases for the opinions given are ultimately rejected by the jury as untrue, the opinions based thereon must also be disregarded. But the failure which will justify such rejection must be a failure in some one or more important data, and not merely in a trifling respect. Further, while these opinions were given in order to aid you in arriving at a proper conclusion, and it is your duty to apply them for that purpose, these opinions are not binding or conclusive upon you. Your obligation is not to substitute such opinions in place of your own judgments, but to make your own determination from all the facts and circumstances, including the opinions of the various witnesses, and reach your own conclusion based on all the evidence adduced and under the charge of the court, as to the validity or invalidity of the will and codicil in question.

Again, gentlemen, in determining the question as to whether the document in question is or is not the last will and codicil of Hattie E. Singer, the mere fact, if it be a fact, that the will and codicil are not such as you would have made, or do not accord with your notions of how she should have disposed of her property, should not be permitted to influence your judgment; for, if the instrument in question is a will at all, it is the will of Hattie E. Singer, and you have no right to attempt in effect to make a will for her, if she was mentally capable of making the same. She had the right under the law, if she was of sound mind and memory, to dispose of her property by will, as she saw fit, subject of course to all her husband's legal rights in her property growing out of the marital relation, of which rights she could not deprive him without his consent. These rights comprise his right of dower or life estate in one-third of her real estate, and an absolute right to one-half of the first four hundred dollars and one-third of the residue in all her personal property after the payment of the debts and expenses of the decedent.

It is not your province merely because of some pre-conceived notions of your own and not sustained by the evidence and the law, to defeat her will by setting her will and codicil aside. On

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the other hand, if the testatrix was not of sound mind and memory at the time of the execution of the instrument in question, it will be your duty to declare it not to be her last will and codicil, and to set it aside. Again, the law will not permit the will to be broken merely by the consent of the devisees, or any one or more of them. If under the law and the evidence the instrument in question is her valid will and codicil, it is your duty to so declare, although some or all of the devisees might be indifferent about it, or even wish the will broken.

Gentlemen, you are the sole judges of the credibility of the witnesses and of the weight and effect to be given their testimony. You will judge of their credibility by their demeanor on the witness stand, their intelligence or lack of intelligence, the probability or improbability of the stories which they tell, the interest, if any, which the witnesses have in the controversy, their relations to the parties to the controversy, and all the other facts and circumstances, and you will give to the testimony of each witness such weight as in your judgment it deserves.

Two forms of verdict will be furnished you, one declaring that the paper writing in question is the last will and codicil thereto of Hattie E. Singer, and the other declaring that the paper writing in question is not the last will and codicil of Hattie E. Singer. When nine or more of your number have agreed upon a verdict, the nine or more so concurring will sign the same, and you will return with it into court.

You may retire.

The jury returned a verdict setting aside the will. Later, a motion to set aside the verdict and for a new trial was overruled.

CONSTRUCTION OF WILL.

Common Pleas Court of Crawford County.

A. J. BROWN, AS ASSIGNEE, ETC., v. JOHN W. HUNSICKER.

Decided, July 28, 1919.

Will Awkwardly Drawn by a Farmer—Meaning of Testator Ascertained by Eliminating Subordinate Phrases—Widow Held to have been Given the Fee in Land.

In a will providing, "I give, devise and bequeath to my wife Catherine Hunsiker all my personal property and real estate and I give the full control of all my property as above mentioned and shall be in her own name after my death or if she wishes to do so and after her death it shall be divided equally among my legal heirs," gives to the wife, Catherine, the fee to the land.

L. C. Feighner, for plaintiff.

W. C. Beer and *O. W. Kennedy*, for defendants.

WRIGHT, J.

This action was brought in the probate court by an assignee to sell real estate to pay the debts of the assignor, and now comes into this court on appeal. The assignee claims title to the real estate through the will of Wm. Hunsicker, father of John W. Hunsicker, the assignor. The case involves the construction of the will of Wm. Hunsicker. The plaintiff claiming that Catharine Hunsicker, wife of the testator, received a life estate under his will, and the minor defendants by their guardian *ad litem* claim that the widow, Catharine Hunsicker, received the fee to the land under her husbands will, and that through the will of Catharine Hunsicker, the interest in the land sought to be sold came to them. There is no dispute over the will of Catharine Hunsicker, that she gave the land or the interest in dispute to them, subject to a small legacy payable to their father, John W. Hunsicker. So the only question to be decided is, whether Catharine Hunsicker, the widow, received a life estate

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or the fee under the will of her husband in the land sought to be sold.

It was admitted by counsel that Catharine Hunsicker received more by way of inheritance than her husband, but that their joint inheritances and accumulations were all in the husbands name, at the time of his death. It was also admitted that the will was drawn by a farmer, which seems an unnecessary admission, as a Craftsman is usually known by the fruits of his labor; and so long as the people will eat bread that is baked by the shoemaker or blacksmith they can expect the doctor and undertaker to reap rich rewards; and so long as the people will entrust the drafting of important legal instruments to the tiller of the soil or the drug clerk, who has been burdened with the high and exalted commission of notary public, they can expect the fruits of their ignorance to fill the dockets of the courts and that some of their accumulations will be consumed in righteous litigation.

The will consisted of a printed form. Item one is the usual printed clause providing for the payment of debts; item two is the written part of the will, which has no punctuation or paragraphing and reads as follows:

“Second—I Give, Devise, and Bequeath to My wife Catharine Hunsicker all my Personal Property and Real Estate and I Give the full controle of all my Property as above mentioned and shall be in Her own Name after My Death or if she wishes to do so and after Her death it shall be Divided Equal among my Legal Heirs.”

A large number of cases have been cited and commented upon by counsel in the case, none of which construe this will, or come near enough in the language used to give much aid to the court in finding the intention of the testator in this case. So it remains the duty of the court to ascertain the intention of the testator from the words he has used and give effect to the legal consequences of that intention when ascertained. The grammatical construction, or rather ungrammatical construction or order of particular sentences in the will is not allowed to de-

feat the general intention of the testator, if that intention is clearly manifested by the provisions of the will as a whole.

Reading item second from the beginning to the conjunctive word "and" it is as follows:

"I, Give, Devise and Bequeath to My wife Catharine Hunsicker all My Personal Property and Real Estate."

Thus far the testator gives his entire estate to his wife, including the fee in the land; there could be no other meaning given to the words used. Then follows this language:

"and I give the full controle of all my property as above mentioned and shall be in Her own name after My Death."

This sentence or expression apparently ratifies and strengthens the expression first quoted in giving his estate to his wife, because he intends her to have full control and his estate to be in her own name. To be sure she might have full control and have it in her own name during a life tenancy, if such was created, but the devise was not qualified or limited in any manner; it was an unqualified devise of all of his estate to his wife.

Then follow the words, "or if she wishes to do so, and after her death it shall be divided equal among my legal heirs."

In what manner does this clause qualify or limit the original gift made in fee.

If the words "or if she wishes to do so" are entirely eliminated, then it is clear that the following words "and after her death it shall be divided equal among my legal heirs" would qualify the devise to the wife by giving the remainder to his legal heirs, leaving a life estate to the wife, as the intention of the testator. But to eliminate the words, "or if she wishes to do so" from the will, would in effect be making a new will for the testator, by the court, which the court can not do. Those words must be construed and given their meaning along with the entire will, to get the intention.

The clause or if she wishes to do so, is a simple expression which can have but one meaning, and must have been so understood by the testator and farmer drafting it, and that is, if the

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wife wishes after her death she can divide it equally among his legal heirs.

If the testator had said "I wish it to go after her death to my legal heirs" then under the holding of the courts the word "wish" would be given the effect of the word "give"; but in this will the testator leaves it to his widow to do as she wishes "or if she wishes to do so, etc.," which at most would amount to a recommendation or request to the wife.

The clear intent is that the wife Catharine have the fee in the land. The petition of plaintiff is therefore dismissed.

NON-EXPERT TESTIMONY AS TO THE MENTAL SOUNDNESS OF A TESTATOR.

Common Pleas Court of Hamilton County.

MABEL KOHL, PLAINTIFF, v. THERESA KOHL, EXECUTRIX,
DEFENDANT.

Decided, July 31, 1919.

Wills—Competency of Opinions as to Mental Unsoundness—Those of Non-experts Limited to Time of Observation—Scintilla Rule Applicable to Will Cases.

The opinion of a non-expert witness that a testator was mentally unsound is admissible only after he has testified to some fact or circumstance indicating mental weakness or unsoundness in some degree, and must be confined to the opinion of the witness as to the mental condition of the testator at the time of observation.

Robertson, Buchwalter & Oppenheimer, for plaintiff.

Harry J. Wernke and Peck, Shaffer & Peck, contra.

MATTHEWS, J.

This is an action, instituted by an only child, to contest the validity of the will of Henry Kohl, deceased.

On the trial proponent of the will, at the close of the plaintiff's evidence, moved for an instructed verdict sustaining the will, which the court granted. The case now comes before the court upon the plaintiff's motion for a new trial.

A transcript of the evidence has been furnished the court, and in view of the court's ruling that no evidence had been adduced tending to invalidate the will, the court has taken considerable pains to examine this transcript of the evidence, seeking for evidence and deductions therefrom tending to invalidate the will, but has been unable to find any. Henry Kohl was a policeman. He had been married twice and had a daughter by the first marriage. About ten years before making the will in question, he divorced his first wife, and within a year thereafter married his second wife. Both his first and second wife and also his daughter, the contestant, survive him. In the divorce case he was ordered to pay twelve dollars per month for the support of his daughter, which order he observed for several years until she secured employment, when he discontinued payments, and proceedings in contempt were prosecuted against him by her. There was certainly no intimate relationship existing between father and daughter after that time, and in 1912, Henry Kohl executed the will in question, in which he gave all his property of every description to his then wife, and named her as executrix without bond. He died more than three years after the making of the will.

Counsel for plaintiff in his opening statement to the jury claimed that the will was invalid because of lack of testamentary capacity and undue influence exerted by the second wife over the testator. The only evidence that is claimed to show undue influence is that of Josephine Weishaupt, who testified that Mrs. Kohl told her, about the time that the daughter arrived at the age when the payment for her support would be discontinued, that "I will be glad when we are through paying Mabel—that we are done with her; that three dollars a week is my extra pin-money; when we are done with her, that is all Mabel will get; I would rather will it to others." At that time the home

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stood in the name of the second Mrs. Kohl. There is no evidence introduced showing that the free agency of Henry Kohl in the execution of his will was destroyed, or that the terms of the will did not in every respect carry out his independent wishes, and in the opinion of the court, the language attributed to Mrs. Kohl by this witness did not have any legitimate tendency to show that she was dominating her husband, or intended to, or was controlling his mind with reference to the execution of his will.

Upon the subject of testamentary capacity the evidence was equally barren of probative force. The only unusual incident in the life of Henry Kohl was that relating to the divorce of his first wife and his second marriage. The evidence showed, however, that he secured the divorce, and of course that carried with it the legal conclusion that he was not to blame. The other evidence only showed the usual incidents of the average man's life, and in the opinion of the court it had no tendency whatsoever to prove mental incapacity.

It is claimed, however, that the court erred in refusing to permit certain witnesses to express their opinion as to the mental condition of the testator. Charles A. Kohl, a brother, was asked to state his opinion as to the mental condition of the testator on the date he executed the will. The court sustained an objection to the question, and, independent of all other reasons, the court is of the opinion that the ruling was right for the reason that this witness had not seen the testator for years prior to that date.

It is the settled rule that a non-expert witness is only permitted to express his opinion of the mental condition of a testator at the time of observation. This rule is stated in *Rogers v. Monroe*, 26 C. C. (N. S.), 193. We quote from page 197 of the opinion:

“The defendants called a non-expert witness who was not present at the time of the execution of the codicil on October 20, 1911, and of whom inquiry was made on the witness stand as to the capacity of the testator for transacting the ordinary business affairs of life on that date. Over the objection of the plaintiff, the witness was permitted to answer, and the answer

was favorable to the defendants. We think this question was improper for the reason that non-expert witnesses must confine their opinions to the capacity of a testator to a time when he is under their observation."

The same rule was followed in the case of *Strick v. Kiss*, 26 C. C. (N. S.), 456.

Ella Kohl, the first wife, was called as a witness, and she was asked to express her opinion as to whether the testator was sane or insane in 1912. They had been divorced in 1902 and she had not seen the testator since that date, and of course was not competent to express an opinion as to his sanity or insanity in 1912. Mrs. Kate Kohl, his sister-in-law, was called as a witness, and while there had been no intimate association between her and Henry Kohl, it might possibly be said that she did testify to facts indicating that she had some observation of the testator during 1912 and prior thereto, and she was asked the question as to her opinion as to his sanity in 1912. The court sustained the objection of the proponent of the will to this question. The question sought to elicit the opinion of the witness, not on a collateral matter, but on the direct issue that was being submitted for determination. The witness had testified to no fact or circumstance having any tendency to show mental disorder, and in sustaining the objection to the question, the court followed the rule laid down in *Roush v. Wensel*, 15 C. C., 133.

The third paragraph of the syllabus of that case is:

"A non-expert witness will not be permitted to testify to his opinion of the mental condition of a testator until he shall have testified to facts within his knowledge tending to throw light upon such mental condition and forming a basis for such opinion."

And at page 139, the court says:

"Now, upon what kind of preliminary examination the plaintiff claims the right to ask the witness and have him testify as to the mental condition or capacity of the testator? A non-expert witness may testify to his opinion of the mental condition of

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a person in connection with certain facts previously related and upon which he bases such opinion. He must state his observations and upon what he founds his opinion, but it must appear that those facts—those circumstances—are such as have a tendency, at least in some degree, to indicate mental weakness.”

The same rule was applied in the case of *Moore v. Caldwell*, 6 C. C. (N. S.) 484. At page 493 it will be found that the court applied the rule, and after examining the evidence, came to the conclusion that there were facts upon which the opinion could be based.

A more recent case upon this subject is that of *Board of Foreign Missions v. Bevan*, 17 C. C. (N. S.) 275; 2 Ohio App., 182, in which at page 190 and 191, the court said:

“The principle has come to be generally recognized that non-professional witnesses may give their opinion upon the question of sanity as a result of their personal observations of the person whose mental condition is in issue after stating the facts which they have observed.”

And the court in applying the rule, found that the trial court had erred in permitting eleven witnesses to give their opinions as to the soundness of mind of the testator.

The court is, therefore, of the opinion that no error was committed in excluding the opinion of this witness, that no foundation had been laid for an answer favorable to contestant, and the court is further of the opinion that had this witness been permitted to answer the question, there still legally would have been no evidence of mental incapacity.

In discussing the weight to be given opinions expressed by witnesses, the Supreme Court, in *Niemes v. Niemes*, 97 Ohio St., at 154 says:

“If in a given case, the inquiry of contestant was limited to such character of questioning, the trial court in review would be justified in holding that *no evidence has been offered and in directing a verdict accordingly.*”

In considering the evidence in this case on the motion for a new trial, the court has had in mind the decision rendered by the Supreme Court in the case of *Clark v. McFarland*, the syllabus of which is found in the Ohio Law Reporter of March 10, 1919, in which the court holds that the scintilla rule is applicable to a will contest the same as to other civil actions, and in that case the court held that there was a scintilla of evidence and that the trial court should have submitted the issues of fact to the jury. From an examination of the report of *Clark v. McFarland*, 28 O. C. A., 217; 8 Ohio App., 326, it will be found that facts and circumstances were offered in evidence tending to prove mental incapacity and that those facts and circumstances were formulated in a hypothetical question submitted to two disinterested physicians who testified that in their opinion these facts and circumstances showed mental incapacity.

The record in the case at bar contains no such evidence. In the opinion of the court it is entirely barren of a single item of evidence having any tendency to prove either undue influence or mental unsoundness, and therefore the motion for a new trial is overruled.

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Henderson v. Surety Co.

**CONTRACTS OF INDEMNITY AGAINST LIABILITY DISTINGUISHED
FROM CONTRACTS TO SAVE HARMLESS.**

Common Pleas Court of Franklin County.

CHARLES A. HENDERSON v. SOUTHERN SURETY CO.

Decided, December 6, 1918.

Contracts of Indemnity—Cause of Action Accrues against Liability when Liability is Established—But against Loss or to Save Harmless only when Actual Loss has been Suffered or Liability Satisfied—Purpose of the Bond and Interest of the Parties Thereto to be Regarded—Pleading in an Action under a Bond to Save Harmless.

A petition to recover from an indemnity company the amount of a judgment which has been recovered against the plaintiff, is defective and open to demurrer where there is no allegation that the judgment has been paid, and the language of the bond is not to save harmless from a "liability" but from "pecuniary loss resulting from the breach or unfulfillment of the terms, covenants and conditions of said contract on the part of the principal to be performed."

Wilson & Rector, for plaintiff.

C. S. Druggan, contra.

KINKEAD, J.

By request of counsel for defendant the demurrer to the fifth defense of the answer of the surety company is reconsidered.

The contention of counsel for defendant is that the demurrer to the fifth defense searches the record, and that therefore the petition should be found fatally defective for the reason that the judgment rendered against defendant in the case pleaded in the petition is not shown to have been satisfied; therefore plaintiff's petition must fail.

It is alleged that in case No. 76,364 in this court, wherein *Douglas et al, County Commissioners*, were plaintiffs and *Henderson*, plaintiff herein, was defendant, a judgment for \$6,916 was rendered against plaintiff.

Nelson & Angelo made a contract with the board of county commissioners to complete a contract for construction of a ditch. Later this contract was surrendered, a new contract being made by Nelson, Angelo & Co. and Pear Nelson on March 2, 1916, whereby Pear Nelson assumed the ditch contract releasing plaintiff Henderson therefrom. Nelson agreed to release Henderson from the obligations of the contract and to furnish a bond of indemnity against any and all liability thereunder.

Pursuant to this contract the defendant surety company executed a bond of indemnity reciting that Nelson was bound to Henderson for payment of \$6,650, and obligating such surety company to

“well and truly save harmless the said C. A. Henderson from any pecuniary loss resulting from the breach of fulfillment of the terms, covenants and conditions of the said contract on the part of the principal to be performed, etc.”

Pear Nelson, the principal in the bond, took over the contract for construction of the ditch, from Nelson, Angelo & Company.

The contract with the commissioners was made October 14, 1915. Plaintiff's original connection with the matter was as surety to the commissioners on the bond of Nelson, Angelo which obligated Henderson to an indemnity to the county for \$6,650.

When Nelson, Angelo & Company released the contract and Pear Nelson assumed its obligations, the bond in question was executed by the surety company to indemnify Henderson against his original liability as surety on the Nelson & Angelo bond to the county commissioners of October 14, 1915.

In an action on the bond signed by Henderson the judgment for \$6,916 was rendered against plaintiff as before stated. The petition avers that plaintiff is bound to pay the judgment, and that,

“the same being a lien upon all the real property of the plaintiff from the first day of April term of the said court. Neither of said defendants have paid said judgment or any part thereof, although demand has been made upon them so to do, and to

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indemnify and save harmless the plaintiff from loss resulting from the breach and unfulfillment of the said contract of March 2, 1916. The said demand was made on the defendant, Southern Surety Company, in writing on July 11, 1916."

Counsel for the surety company claims that Henderson must first pay the judgment of \$6,916 before he can call upon the surety company to reimburse him. In other words it is claimed that the bond constitutes a contract to

"indemnify and save harmless * * * from any pecuniary loss resulting from * * * breach of * * * covenants and conditions * * * of the contract, etc."

The law clearly makes a distinction between a contract of indemnity against a *liability*, and a contract to *indemnify or save harmless from damage or loss* on account of a liability. Authorities fully sustain the view that the cause of action on an *indemnity against a liability* accrues and is complete when the *liability is established*, actual payment thereof or actual damage therefrom in such case not being essential.

On the other hand there are decisions which support the view that the cause of action upon a contract to *indemnify or save harmless from damage or loss* does *not accrue until actual damage or loss* has been sustained. (See 22 Cyc., 90, where the decisions are collected.)

This doctrine is well settled by Ohio decisions. In *Henderson, etc., Co., v. Shillito Co.*, 64 O. S., 236, on p. 254, it is stated:

"There is an essential difference, in legal effect, between covenants of indemnity, strictly, that is, of indemnity against loss, and covenants to pay, or assume, or stand for, the debt, *or of a surety's liability* thereon. A right of action accrues on those of the latter class as soon as the debt matures and is unpaid, because the liability then becomes absolute, and the failure to pay is a breach of the express terms of the covenant. While those of the former class are not broken, and no right of action accrues, until the indemnitee has suffered a loss against which the covenant runs. This distinction grows out of the express terms of the contract, and is well established by authority." (Some cases are then reviewed.)

Martin v. Bolenbaugh, 42 O. S., 508, is an instance where the condition of the obligation was that the surety was to pay to the sheriff, or cause to be paid, the full amount of any *judgment and costs recovered against the sheriff*. This was an explicit undertaking to pay a *liability*. It was held unnecessary either to aver or prove payment of the judgment by the obligee prior to bringing action.

Pratt v. Walworth, 15 C. C., 412, was a case where one party indemnified by contract against *all liability on certain obligations*. It was held that the indemnified party had a cause of action against the indemnitor when judgment was obtained. The opinion draws the distinction between the two classes of obligations.

In *Cousins v. Paxton, etc., Co.*, 122 Iowa, 465, the holding of *Henderson, etc., Co. v. Shillito Co., supra*, was followed and its doctrine adopted and applied, the following being stated in the opinion:

“If the obligee of the bond has paid nothing, he had suffered no damage as a matter of fact; *a mere liability to pay may ripen into an actual loss, but if it is never paid no damage results to the obligee by reason thereof*, and in such circumstances the *liability to pay constitutes no damages for which the indemnity was given*. The law recognized a well-defined difference between covenants of indemnity against loss, and covenants to assume a liability. In the former class the covenant is not broken, and no right of action accrues, until a loss has been suffered against which the covenant runs, while in the latter class the covenant is broken, and a right of action accrues, whenever the liability is fixed and absolute. *This distinction grows out of the express terms of the contract, and must be recognized, otherwise a new contract would be made for the parties, and their rights determined thereunder, instead of by the contract they made.*” See also case in 122 Iowa, 656.

A valuable suggestion is made by the learned Roscoe Pound as judge in delivering the opinion in *Northern Assurance Co. v. Borgelt*, 67 Neb., 282 (1903), in which he stated the familiar doctrine that:

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“Courts now incline strongly to construe bonds as contracts of indemnity only, and will attach more importance to the general purpose of a bond, as shown by its provisions as a whole, and the interests of the parties in the subject-matter, than to the precise form of words employed.”

Having thus reviewed the material cases we now undertake to apply whatever wisdom or inspiration is to be derived therefrom to the problem of the present case. Often in law-class rooms and elsewhere we have stated that cases are tombstones pointing to the errors of men; that they are guide posts directing the way to avoid these errors. The adjudications sometimes are the receptacles of rules and doctrines which can be used and applied to guide counsel and court in the settlement of subsequent controversies; their rules should be adopted and followed; they also furnish thoughts and inspirations which aid in the solution of future similar problems.

In some cases presented to courts for adjudication, the parties may not have observed or noticed the guide post and hence may have committed the same error which is recorded in an adjudicated case.

The cases dealing with this question have directed our attention to the two classes of contracts: (1) the indemnity against loss or to save harmless from pecuniary loss resulting from the breach or unfulfillment of the terms, covenants of a contract, such as the present obligation; and (2) an obligation to pay a liability.

The thought expressed in *Cousins v. Paxton, etc., Co., supra*, may also be of service in solving the present question. Henderson sustained a liability of a surety in the original bond. His obligation thereon may ripen into an *actual loss*, and it *may not*. If it is *never paid* he will suffer no loss or damage, hence he would in such case have no right to call upon the indemnitor to make good any loss.

The allegation in plaintiff's petition that he is *bound to pay the judgment*, is a mere legal conclusion; it is not the statement of an ultimate operative fact. So the allegation that the judg-

ment is "*a lien upon all the real property of the plaintiff, etc.,*" is also a statement of a conclusion of law.

The petition fails to state that plaintiff has or owns any real property; or if he does, its nature, extent, value or location is not disclosed. The court is not properly advised whether a judgment lien upon real property exists, whether if it does, it could be sold to satisfy plaintiff's obligation to make good the judgment, and if so what plaintiff's loss or damage would be. In any event it seems that there can be no certainty about the matter.

If plaintiff should have no property subject to execution; or if he should not have sufficient to fully pay the amount of the judgment, the extent of "*any pecuniary loss resulting from the breach, etc.,*" can not be determined.

To permit this action to proceed upon the present showing by plaintiff would therefore be wholly improper.

The case comes within the class of indemnities forbidding plaintiff to recover upon the present petition. Whether plaintiff can so amend his petition as to show the extent, nature and value of his property as well as facts disclosing with definiteness the consequence of any lien upon plaintiff's property so as to take the case out of the general rule, the court is unable to determine. It seems doubtful whether a petition can be made to cure the matter.

Leave to file an amended petition will not be granted except upon tender of an amended petition.

The demurrer, searching the record and reaching back to the plaintiff's petition, the same is sustained for the reason that it does not state facts sufficient to constitute a cause of action.

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Eliopolus v. Burger et al.

ACTION FOR SPECIFIC PERFORMANCE.

Common Pleas Court of Hamilton County.

LOUIS ELIOPOLUS V. FRANK J. BURGER AND KATE M. BURGER.

Decided, April Term, 1919.

Rentals—Recovery of in an Action for Specific Performance—Full and Complete Relief May be Given for Loss Sustained.

In an action for specific performance of a contract for sale of real estate the plaintiff may, as ancillary relief, ask judgment for rentals which have accrued from and after the making of the contract for sale and purchase.

Charles B. Terry for plaintiff.*John Thorndyke*, contra.

DARBY, J.

This is an action for specific performance of a contract for the sale of real estate.

After the answer was filed, the plaintiff filed a supplemental petition setting forth that at the time the defendants agreed to sell and convey property to the plaintiff, the same was occupied by tenants from whom the defendants received monthly rental; that the rentals paid by the tenants from that time up to the present month of April, 1919, amount to about \$1,350, which the plaintiff has demanded of the defendants, and which was refused.

The prayer of this supplemental petition is as follows:

“Wherefore plaintiff prays as in his original petition, and for an accounting of rents and profits arising from said property from and including the month of August, 1918; for a receiver to take charge of said property pending the hearing of this suit and for judgment for said rents and profits and other relief to which he may be entitled.”

A demurrer was filed to the supplemental petition on the ground that plaintiff has already elected to sue for specific performance, and that there is a misjoinder of causes of action.

In support of their contention defendants cite two cases which are substantially in accord as follows; *Zutterling et al v. Drake*, 10 C. C. (N. S.), 167, and *Lee et al v. Thoma*, 17 C. C. (N. S.), 144, in which the rule is stated to be:

“An election between remedies can be made but once, and where a plaintiff has chosen to ask for specific performance he can not subsequently maintain a suit for damages.”

In both of these cases the plaintiff had made his election between specific performance and damages, and subsequently sought to maintain a different action arising upon the same contract. This the court held could not be done, as his election between the remedies was binding.

The principle of these cases has no application to the case at bar. The original petition prays—

“That defendants herein be decreed to convey said premises to plaintiff by a general warranty deed.

The supplementary petition prays, not only as in the original petition, but also for an accounting of the rents and profits arising from the property and for a receiver to take charge, etc. The relief sought by reason of the supplemental petition is nothing more than ancillary to the petition.

Under the ample authority of a court of equity to grant full and adequate relief for breach of contract for specific performance, allowance would be made for rents, etc., without this supplemental petition.

In *Worrall, etc., v. Munn*, 38 N. Y., 137, the rule is stated as follows:

“When a court of equity sustains a bill, filed to compel the specific performance of a contract for the conveyance of lands, and decrees such conveyance, it is within the proper exercise of its jurisdiction, and according to its settled modern practice,

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to give full and complete relief, by awarding to the plaintiff, not only the conveyance to which he is entitled, but also the damages which the defendant has caused by his refusal and delay in the performance of his contract, and these may be ascertained by the court in any mode which its discretion approves.

“The general rule that the vendor will be regarded as trustee of the land for the benefit of the purchaser, and liable to account to him for rents and profits, or, if himself in actual occupation of the premises, charged with the value of the use, is not inflexible; and a court of equity will regard the special circumstances of the case, wherever there are any peculiarities, which render the rigid application of any general rule unsatisfactory.”

On page 142 of the opinion we find the following:

“The general rule on this subject, as laid down by the elementary writers, and in the adjudged cases, is, that the court of equity will, so far as possible, place the parties in the same situation as they would have been if the contract had been performed according to its terms; and, to that end, the vendor will be regarded as trustee of the land for the benefit of the purchaser, and liable to account to him for the rents and profits; and the purchaser will be treated as trustee of the purchase money, if not paid, and will be charged with interest thereon. (2 Story's Eq. Jur., Section 789; Fry on Spec. Performance, Section 889, and cases cited.)”

In *Duvall, etc., v. Tinsley*, 54 Mo., 93, the action was in the nature of a bill in equity for the specific performance of a contract for the conveyance of lands. A demurrer was filed on the ground that several causes of action were improperly united in the petition. On page 95 of the opinion, the rule is stated as follows:

“The point made is, that the petition claims specific performance, and also the rents and profits, and that it is therefore multifarious. It is a principle of equity jurisprudence too well settled to need illustration or citation of authorities, that a party entitled to a conveyance of the legal title to lands, and also to the possession and rents and profits, may by one suit and one petition or bill, obtain the whole relief. When a court of

equity entertains jurisdiction at all it will give adequate and full relief."

Davenport v. Lattimer, 53 S. C., 567, was an action for specific performance. The court say on page 569:

"The complaint is not demurrable as alleging a cause of action for damages only, which should be tried on the law side of court. The primary right set up in the complaint is equitable, and the claim for damages is incidental to, and intimately connected with, the equitable right claimed. Therefore, while it may be that a court of law could have rendered relief in damages, still, the court of equity having exclusive jurisdiction of the equitable primary right, and concurrent jurisdiction with the court of law as to the incidental and alternative right to damages or compensation, is competent to administer full relief according to the ultimate rights of the parties. *Hammon v. Foreman*, 48 S. C., 175; 26 S. E., 212. The complaint states facts which, if true, would entitle plaintiff to a specific performance of the agreement alleged, or, if specific performance was impossible, to compensation for breach."

San Diego Water Co. v. Flume Co., 108 Cal., 549, was an action for specific performance, in which it was said in the second syllabus:

"Where a complaint sets forth a contract between the plaintiff and the defendant, of which it seeks a specific performance, together with an accounting and damages for breach of the contract, and for general relief, it is not demurrable for misjoinder of causes of action, nor for uncertainty in not separately stating and numbering several causes of action."

See, also, 3 Bates Pl. and Pr., Section 2770; Fry on Spec. Performance of Contracts, 3 Ed., 644.

The plaintiff by his supplemental petition is entitled to the relief asked for ancillary to the general relief prayed for in his petition.

The demurrer will therefore be overruled.

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Newark Gas Co. v. Newark.

RATES FOR GAS.

Common Pleas Court of Licking County.

THE NEWARK NATURAL GAS & FUEL COMPANY V. THE CITY OF
NEWARK ET AL.

Decided, July 17, 1918.

Municipal Gas Supply—Claim that Rate Fixed in Ordinance is Confiscatory—Provision in Decree of Court of Appeals for Application for Modification of Decree—If it Should Appear at any Time that the Rate is Inadequate—Jurisdiction over such an Application.

1. Where the court of appeals has by mandatory injunction ordered a gas company to continue its service at the rate fixed in the ordinance under which it is operating, but with the privilege of applying at any time to a court of competent jurisdiction for a modification of the order if the designated rate fails to yield an adequate return, the common pleas court is without jurisdiction to entertain such an application, which should be made to the court of appeals.
2. A court will look through the forms under which business is done and deal with the real parties in interest, and where a business is being carried on by three different companies the fact that one of the subordinate concerns has lost money is not conclusive of loss by the principal company which is the real party in interest; and where gas is furnished by a corporation which is acting through two subsidiaries, the fact that one of the subsidiaries has lost money does not, standing alone, indicate that the rate is confiscatory.

S. M. Douglass and J. R. Fitzgibbon, for plaintiff.

Henry C. Ashcraft, Frank A. Bolton and Edward Kibler, contra.

KYLE, J.

The plaintiff in this case brings this action against the city of Newark in substance on the ground that the rate for gas,

* Appeal dismissed by the Court of Appeals, see 30 O. C. A., —.

with the discount of 18 cents per thousand cubic feet did not yield a reasonable income and was confiscatory, and seeks to have appropriated a fund of approximately \$29,000 in the hands of a receiver appointed in a former case in this court between the parties hereto.

The defendants for their first defense aver that a former case, No. 16000, commenced in the common pleas court of Licking county, Ohio, finally determined the issues in this case.

For a second defense they aver that the said case in which said receiver was appointed, which was carried to the Court of Appeals, affirmed by the Supreme Court and finally by the Supreme Court of the United States, directed a distribution of said fund by the receiver, and that, therefore, this court in this case is without jurisdiction to direct such receiver in this case as to any distribution of the funds contrary to the decree and final order in the former case.

For a third defense they aver that the plaintiff is guilty of laches by its delay in not bringing this suit until after the time has fully elapsed in which it is claimed that the rate was not sufficient.

For a fourth defense they aver that the Newark Natural Gas & Fuel Company and the Logan Natural Gas & Fuel Company in an action by the city against said companies were found to be one and the same company, and that by the acceptance of said franchise by said companies they are bound to carry out its terms.

The Newark company was a distributing company, and the Logan company a carrying and supplying company. The Logan company charged the Newark company 16 cents for the delivery of the gas at the corporate limits of the city, which left a margin of 2 cents of the 18 cent rate to the Newark company, and the evidence shows that during that period the Newark company lost \$11,791, taking into account the value of its distribution system and expenses.

All the stock of the Logan company, except five shares which are held by five persons, nominally directors, is held by the Union Gas Company of Pittsburg; and all the stock of the New-

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ark company, except five shares held by five persons as directors, is held by the Union Gas Company of Pittsburg. The five directors of the Logan and Newark companies are the same, with the exception of one person. No dividends are declared upon the stock of either the Newark or Logan company. No money ever passes between the two companies. The accounts are carried upon the books of the Union Gas Company. A charge is made as against one company at the rate of 16 cents for furnishing the gas and two cents per thousand for the company distributing the gas.

The former case in the court of appeals in which the court perpetually enjoined the Newark company from collecting any further sum than the rates fixed by the ordinance, further provided:

“This finding and decree of the court is made, however, without prejudice to the right of the defendant company at any time to apply to a court of competent jurisdiction to modify said finding, if at any time it should appear that said rate of 18 cents net does not render an adequate return to said defendant company.”

It is of no consequence in that case what the decree was in the court of common pleas, as it was superseded by the decree in the court of appeals. The decree of the court of appeals was affirmed by the Supreme Court of Ohio, and the Supreme Court of the United States, and this suit is brought under the provisions of that decree seeking to modify said finding, and the question presented is: Has the court of common pleas jurisdiction to modify the finding and decree of the court of appeals?

The provision of the decree was that the defendant company might apply to a court “of competent jurisdiction to modify said finding.” If the decree of the court of appeals must be modified before the plaintiff can have its remedy, which it seeks in this case, it seems to me that such remedy should have been sought in the court of appeals in that case wherein an application could have been made to reinstate the case and have the court modify its former decree.

The language of the decree is that it must be "a court of competent jurisdiction" to modify a finding of the court of appeals. If it had been intended that a new action could have been brought in the common pleas court, the entry would not have made the provision which it did. Therefore, I am of the opinion that the court of common pleas is without jurisdiction and is not a court of competent jurisdiction to modify the decree of the court of appeals.

In case No. 17422, decided by Pudge Jewell, referring to the Newark and Logan Gas Companies, he held that—

"They are, in fact, one corporation doing business under separate names. All profits go to the Union Gas Corporation. * * * The fact that both companies were taken over and merged into one, viz.: the Union Gas Corporation, some years thereafter can not relieve the Logan Natural Gas & Fuel Company from its responsibility."

The court, I think, should look through all forms in which business is done and deal with the real parties in interest. In substance and in fact the Newark and Logan Gas Companies have no existence, but are simply a method and form through and by which the Union Gas Company does its business. I think in this case the court should disregard the fiction of the corporate names of the Newark and Logan Gas Companies and consider the interests and rights of the Union Gas Company, which is the only and real party in interest. While nominally the Union Gas Company is not a party defendant, yet its interests may be dealt with and considered in this case through the Newark Gas Company.

It might be true and is true under the evidence that upon a basis of two cents per thousand feet to the distributing company there was a loss of more than \$11,000, which was a loss suffered by the Union Gas Company, but it does not anywhere appear how much the Union Gas Company may have profited by its rate of 16 cents per thousand which it received through the Logan company, so the court could not find that the Union Gas Company, the real party in interest, was suffering a loss

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in furnishing the city of Newark with gas, for it would be necessary in order to determine that question to find out and show how much it cost to produce and deliver the gas at the city limits.

Therefore, it is my opinion that if the court had jurisdiction that the plaintiffs have failed to make out a case to entitle them to relief in a court of equity.

As to whether or not the court could afford relief, if the court had found in favor of the plaintiff company, to subrogate and appropriate the fund now in the hands of the receiver is not necessarily determinative of the case, for if the plaintiff had established his right to relief the method of obtaining it would be for the court which had so found, and that question would arise after the court had found in favor of the plaintiff company.

The period for which plaintiff seeks recovery under the rate of 18 cents was from August 1st, 1915, to March 1st, 1916. It is claimed by the defendants that the plaintiff is guilty of laches for the reason that this suit was commenced some time after March 1st, 1916, to-wit: July 13th, 1917.

No doubt the plaintiff relied upon its right to recover in view of the 6th syllabus of the case of *Gas Company v. Newark*, 92 Ohio State, page 394, where the court says:

“Where it is not clearly shown that a fixed rate for gas will be confiscatory, the company will be required to abide the test of actual experience under such rate, and, when certainty rather than prophecy may be obtained, present its case upon actual facts and conditions as may be then shown to exist.”

It does seem strange that the Newark company should not have discovered the loss it was sustaining in distributing the gas upon this alleged two per cent. margin until so long after the termination of the alleged period over which they seek relief. While it would seem that a case of laches had almost been established, yet giving the decision of the supreme court the widest latitude I would be inclined to think the company might have a remedy if they had, in fact, established a cause of action.

As to the fourth defense, if the company had its lines in the city it could do nothing else than to deliver gas upon the rate fixed by council and the acceptance of the franchise would not bar them from bringing an action to show that it was, in fact, confiscatory.

Therefore, my conclusion rests upon two grounds,

First: That this court has not jurisdiction to modify the decree and finding of the court of appeals, and,

Second: That the plaintiff has not established that the rate of 18 cents was confiscatory without dividing it up into parts.

And, therefore, a finding may be so made.

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PRIORITY AS BETWEEN LIENS.

Common Pleas Court of Montgomery County.

THE BANKERS COMMERCIAL SECURITY COMPANY v. S. K. COFFMAN, W. T. STRICKLER AND THE GRAMM-BERNSTEIN MOTOR COMPANY.

Decided, October 17, 1919.

Lien for Repairs—Prior to that of a Chattel Mortgage—Corporation as a Lienholder has Same Rights as an Individual.

A lien for labor and materials expended in the repair of a machine is superior to the lien of a chattel mortgage, but the priority of such a lien does not extend to such items as storage and the cost of material used in the operation of the machine.

SNEDIKER, J.

This action was brought by the plaintiff corporation for the recovery of \$1,566.60, with interest, on seven promissory notes made by the defendant, S. K. Coffman, payable to W. T. Strickler, and endorsed by the payee to this plaintiff. To secure these notes there was given to Strickler a chattel mortgage upon one Model 5, six-ton Gramm-Bernstein truck, 1917 model. The mortgage and notes bore date of June 18, 1917. The mortgage was filed on that day at the office of the recorder of Montgomery county, Ohio. Subsequent to the delivery of the truck to Coffman, and after the giving of the notes and mortgage referred to, and on or about June 17, 1918, this truck was brought to Lima, Ohio, and delivered to the factory of the defendant, the Gramm-Bernstein Motor Truck Company. Thereupon this company, without knowledge of the plaintiff's mortgage lien, did certain work and furnished materials, labor and new parts for and upon the truck, repairing and overhauling it and putting it in good condition in accordance with orders and instructions received at the time the truck was so delivered. The total

amount of the labor, parts and material done and furnished was of the value of \$530.20. The work was completed and the truck ready for redelivery on June 28th, 1918. Neither Coffman nor Strickler, when notified of this fact, removed the truck, and it remained in the possession of this defendant corporation until the plaintiff, on August 25th, 1919, secured a judgment in this court for the amount of its claim, an order of foreclosure and sale, and it was sold under the order of sale so issued by the court. A return of that order of sale shows that the truck was appraised for \$1,800, and sold for \$1,860, plus the costs made on the sale. The fund so realized from the sale is now in the hands of the clerk of this court for distribution.

We are called upon to determine as to the priorities of the respective parties plaintiff and defendants, the one by reason of its judgment on account of the chattel mortgage, the other by reason of its lien for work, labor and materials furnished in the repair of the truck.

Counsel for these parties have submitted an agreed statement of facts in which all of the matters and things heretofore recited are agreed to be true.

The lien claimed by the Gramm-Bernstein Motor Truck Company is one which has long been recognized at common law, and, in some of the states, has been made the subject of legislation. In our own state it has not. The fact that this company is a corporation does not to our mind make any difference as to its right to such a lien. It is, of course, true that at the time that this lien was first recognized, corporations for business purposes had not come into existence, and that originally the right to the lien must have been accorded only to individuals and to companies composed of individuals. But when a corporation is formed it possesses an individuality of its own. It has an entity, and is entitled under the law, unless excluded specifically, to all the rights in business transactions which are possessed by a sole person conducting a like business.

The first consideration in the determination of the question

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before us suggests the question as to where the title to this truck was after the giving of the mortgage by the purchaser. Under the law of Ohio, which differs from some of the other states, the interest of a mortgagee under a chattel mortgage is that of a general owner of the property mortgaged. 26 O. S., page 659. As such general owner the title to the truck was in the mortgagee. If the title to the truck was in the mortgagee, had Coffman and Strickler, by their possession of it and by their delivery of it to the defendant corporation for repairs, such a relation to the truck as would give this defendant corporation, having made the repairs and having retained possession of the truck after such repairs, a right to a lien on account thereof, which was superior to prior existing liens on the property?

Generally stated, the rule is:

“A mechanic at common law has a lien on all personal property for repairs (persons having by common law the right to retain goods on which they have bestowed labor, until the reasonable charges therefor are paid. 2 Kent’s Commentaries, 635). In the absence of specific agreement, if a party has bestowed labor and skill on a chattel bailed to him for such purpose, and thereby improved it, he has by general law a lien on it for the reasonable value of his labor or the right to retain it until paid for such skill and labor.”

In the case of *Hammond v. Danielson* and another, 126 Mass., page 294, the Supreme Court say:

“A lien on personal property can not, indeed, be created without authority of the owner. But in the present case such an authority must be implied from the facts agreed. The subject of the mortgage is a hack, that is to say, a carriage let for hire; described in the mortgage as ‘now in use’ at certain stables; and which, as the parties have agreed in the case stated, the mortgagor retained possession of and used agreeable to the terms of the mortgage. It was the manifest intention of the parties that the hack should continue to be driven for hire, and should be kept in a proper state of repair for that purpose, not merely for the benefit of the mortgagee, but for that of the mortgagor also, by preserving the value of the security and

affording a means of earning wherewithal to pay off the mortgage debt. The case is analogous to those in which courts of common law, as well as of admiralty, have held, upon general principles, independently of any provisions of statute, that liens for repairs made by mechanics upon vessels in their possession take precedence to prior mortgages."

In the case at bar there is no agreement that the phrase "now in use," or any similar phrase, is contained in the mortgage, but it does appear from the pleadings, the allegations of which are admitted to be true, that in the case before us, the truck was in the lawful possession of those defendants who left it with the Gramm-Bernstein Motor Truck Company for repairs. The same state of facts existed in the case of *Broom & Sons v. Dale & Sons*, 67 Southern Reporter, 660, where the Supreme Court of Mississippi say:

"In this case the automobile was intrusted by the party who had the lawful possession of it to the appellants to be repaired. By virtue of the labor done by appellants and the material used by them in making the repairs, they had the right under the common law, as well as under the statute (of Mississippi) to retain possession thereon until they were paid their charges."

This case was one where the vendor sold the machine, transferred the possession, but reserved the title to secure payment, which would place him in the same position with reference to the general ownership of the property as this plaintiff occupies under the law of Ohio. Further discussing this case the Supreme Court of Mississippi say:

"From the agreed facts in the case we understand that the repairs were such as were necessary to preserve the automobile and keep it in proper condition for its use. Repair means to restore, renovate, or mend an article; to keep it in good or sound condition. Repairs, in the ordinary sense, are made to prevent deterioration in an article, and to keep it up in its value and preserve it for the use intended. It was clearly the intention of the parties that Mr. Polk, the mortgagor, should continue in the ordinary use of the automobile. While being so used it was necessary to keep it in a sufficient state of repair. This would be not only to the benefit of the user, Mr.

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Polk, but by preserving the value of the property was also for the benefit of appellees as mortgagees.”

The effect of the agreed statement of facts in the case at bar is an admission of the necessity of the repairs made by the defendant corporation, on an inspection of the items of which the court finds that they were of a character necessary to preserve the truck and to keep it in proper condition for use. From the first item, “port plug gaskets” to “bolts, washers, nuts, gaskets, etc.,” we find all of the different repairs made to be of a kind which are essential to the operation of the machine. For instance, among others are a governor rod, a crank-shaft, a crank-shaft gear, valves, discs, connecting-rod bearings, priming cups, an oil gauge glass, a fan pulley, a clutch shaft, a transmission lock, an exhaust pipe, and copper tubing. It is unthinkable that the plaintiff company, who under the law of Ohio, unless there was a reservation of right of possession in the mortgagor, is entitled to possession, would expect the purchaser to retain the truck without use. The use of an article of this character contemplates not only wear and tear, but depreciation incident to accident, and whether these repairs became necessary on account of wear and tear or on account of accident, the permitted use of the truck brought them into contemplation.

Another case which is enlightening is that of *Watts v. Sweeney*, 127 Indiana, page 116, where it was held that a mechanic who made repairs on a locomotive and tender had a lien which took precedence to that of the mortgagee where the property was permitted to remain in the possession and use of the mortgagor and through such use it became necessary to repair it. In the opinion the Indiana Court say:

“When the mortgagee intrusts machinery of the character in controversy to the custody of the mortgagor for a long period of time, to be used by the mortgagor in operating the railroad, it will be presumed against the mortgagee that all the necessary repairs were contemplated, and the mortgagor was, in case of needed repairs, constituted the agent of the mortgagee in

procuring such repairs, and in such case equity gives the mechanic a lien for his services and materials. The repairs add to the value of the property, and they are for the benefit of the mortgagee as well as the mortgagor.

“Where the property is to be retained and used by the mortgagor for a long period of time, it will be presumed to have been the intention of the parties to the mortgage, where it is property liable to such repairs, that it is to be kept in repair, and when the property is machinery, or property of a character which renders it necessary to intrust it to a mechanic or machinist to make such repairs, the mortgagor in possession will be constituted the agent of the mortgagee to procure the repairs to be made, and as such necessary repairs are for the betterment of the property, and add to its value to the gain of the mortgagee, the common law lien in favor of the mechanic for the value of the repairs is paramount and superior to the lien of the mortgagee. The mortgagee is presumed in such case to have contracted with a knowledge of the law giving to a mechanic a lien.”

As said by the Supreme Court of Maryland, in 8 Gill, page 214:

“The doctrine of lien is more favored now than formerly; and it is now recognized as a general principle, that wherever the party has, by his labor or skill, etc., improved the value of the property placed in his possession, he has a lien upon it until paid. And liens have been implied when, from the nature of the transaction, the owner of the property is assumed as having designated to create them, or when it can be fairly inferred, from the circumstances, that it was the understanding of the parties that they should exist. The existence of liens has also been sustained where they contributed to promote public policy and convenience.”

In the 43 Missouri Court of Appeals, page 144, in the body of the opinion, the Court say, pages 148, 149 and 150:

“Has this lien a preference over the antecedent mortgage, the debts secured therein being overdue? It must be conceded that the labor performed by the artisan must be at the request of, or by consent of, the owner. A servant of the owner of a carriage broke it, without the master's knowledge, and, without his knowledge, took it to a coach-maker for repairs. It was held that there was no lien. 4 Esp., 174. It is from this principle

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of the lien law, that plaintiff built much of his contention. He insists that, as in this state, a mortgagee, at least after condition broken, as in this case, is the owner of the mortgaged chattels, and as he did not consent to, or order, the repairs, that no lien exists. It is true that, after condition broken, the mortgagee of chattels becomes the owner. But this proposition, from the nature of the relation of the parties, after condition broken, is subject to qualification, or, at least, explanation. The mortgagor has, nevertheless, a right of redemption, and, frequently, as was done here, he is permitted to retain the possession and use of the chattel, as though his own. The consent of the owner need not be express. It may be implied from the circumstances. And it has been expressly held that the consent need not be given with such formality as to render the owner personally liable for the charges. 44 N. J. L., 105. That case was where the wife was the owner of a wagon, which she permitted her husband to use in his business carried on for the support of the family. The husband having had it repaired, the against him by the wife. It was held that it was in the contemplation of the parties that the wagon could only be useful for the purpose for which it was used, by being kept in repair.

“Now, in the case at bar, the plaintiff permitted the mortgagor to remain in the possession and use of the chattels, as if they were owners. The nature and character of the property suggests that this permission must have been given for the purpose of such use of the articles as would be of value to those who used them. This, as was said in *Williams v. Allsup*, 10 C. B. (N.S.), 417, by implication, entitled the mortgagor to that which is necessary to keep the property in a reasonably efficient condition for the purposes of the use. The case of *Scott v. Delahunt*, 5 Lans., 3; S. C., 65 N. Y., 128, was where a mortgagor was permitted to remain in the possession and use of a canal boat, after condition broken, and it was held there was implied authority in the mortgagor, to keep her in repair so as to create a lien in favor of the shipwright, superior to the mortgage. * * * So I conclude, that notwithstanding the ownership, with which the law in this state clothes a mortgagee after condition broken, if the property is of such character as suggests use, and that repairs will become necessary for its proper use or preservation, that it must be held to be in the contemplation of the mortgagee that it will be so repaired, and the enhancement of value thereby added will create a lien in favor of the workman superior to the mortgage.”

In view of the foregoing authorities, it is our opinion that in this case the Gramm-Bernstein Motor Truck Company, to the extent of its claims as we shall specify, is entitled to priority over the plaintiff company out of the proceeds of the sale of the truck in question. We limit the lien of the motor truck company to such items of its account as are found between the first item, "8 B-43 Port plug gaskets, .10 .80" and "Misc. bolts, washers, nuts, gaskets, etc. 7.00," inclusive. It ought not to be allowed a priority on account of motor oil, gasoline, transmission grease and the ten months storage. To the items already specified with respect to which we give it priority, may be added 175 hours of labor \$1.00, \$175. A computation on the part of counsel will give the exact amount with respect to which priority is allowed over the claim of the plaintiff company. On the state of the case the Gramm-Bernstein Motor Truck Company is entitled to a judgment for the whole amount of its claim. We do not find an entry of such judgment upon the record. This entry should be made including the finding as to priorities.

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DOUBLE LIABILITY OF STATE BANK STOCKHOLDERS.

Common Pleas Court of Putnam County.

STATE OF OHIO, EX REL PHILLIP C. BERG, AS SUPERINTENDENT
OF THE BANKS OF THE STATE OF OHIO, V. THE PUTNAM
COUNTY BANKING CO. ET AL.

Decided, September, 1919.

*Banks and Banking—Provision in the Federal Constitution Against
Legislation Impairing Contracts—Not Infringed by Statutory
Change with Reference to Liability of Bank Stockholders—Where
Power is Reserved in the State Constitution to Alter, Amend or
Repeal Future Acts of Incorporation—Palestine v. Turnpike Co., 19
Ohio State, 319, not followed.*

The provision of Section 3 of Article XIII of the Ohio Constitution, providing double liability against stockholders of Ohio corporations authorized to receive money on deposit, is enforceable against holders of stock issued and purchased by them during the interim (November 3, 1903 to November 15, 1912), when the Constitution of the state exempted stockholders from such liability.

BLACHLY, J.

This case was heard on general demurrers to the amended petition. The action was brought by the Superintendent of Banks of the state of Ohio to enforce the double liability upon the stockholders of the Putnam County Banking Company, a corporation organized under the laws of Ohio, for the purpose of doing a banking business.

The amended petition shows that this corporation was organized on October 19, 1904, and continued to do a banking business from that time until July 22, 1914, when it was found to be insolvent, and was at that time closed by the Superintendent of Banks of the state and its affairs placed in liquidation by such officer; that all of the stock in such bank was issued between December 1, 1904, and July 8, 1914, inclusive, except

five shares thereof, for which, in such amended petition, there is no date given.

The plaintiff is seeking, in the action to enforce such double liability on the holders of the stock, to pay only that indebtedness of the corporation which was incurred subsequent to January 1, 1913.

It was conceded by counsel on argument that all the stock in the bank was issued between the date of its organization and such date, January 1, 1913, and that the stock issued on July 8, 1914, was a reissue of stock that had been issued between the above dates.

The only question raised on this demurrer, and argued to the court by counsel was, can the double liability now provided for by Section 3 of Article XIII of the Constitution of the state, which became effective November 15, 1912, be enforced against the holders of stock issued and sold during the interim when the Constitution of the state exempted stockholders from such double liability.

It is said by counsel in this case that a stock subscription constitutes a contract between the stockholder, the corporation and the creditors of the latter. The question then, and only question raised on this demurrer is, will the enforcement of the double liability, under the amendment to the Constitution which became effective November 15, 1912, operate to impair the obligation of the contract of the stockholders of this corporation within the inhibition of the federal Constitution.

It would appear at first view of the case cited by counsel for the demurrer (*Ireland v. Palestine, etc., Turnpike Company*, 19 Ohio State, 369) that this question was finally settled by the Supreme Court of the state, and that this demurrer must be sustained, but on careful reading of this case, in the light of the provisions of the Constitution and legislative acts in effect at the time of the incorporation of the *Turnpike Company*, and the time when the double liability was sought to be enforced, it would seem that the Supreme Court did not consider one of the vital questions entering into the case at bar, that is,

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that while the Constitution of the state of Ohio, at the time of the incorporation of the Putnam County Banking Company provided that there should be no double liability on the holders of stock in a corporation, there was a further provision in the Constitution (Section 2, Article XIII) providing that "corporations may be formed under general laws, but all such laws may from *time to time be altered or repealed.*"

This brings us to the effect, if any, this provision of the Constitution has on the contract conceded to exist between the stockholder, the corporation in this case, and the creditors of the latter, which question does not seem to have been presented to or considered by the Supreme Court in the case of *Ireland v. Turnpike Company, supra*.

This question has been passed upon by the courts in a number of foreign jurisdictions, including the Supreme Court of the United States.

The latter court, in the case of *Looker v. Maynard*, 179 U. S., 46, passed directly upon this question, and holds:

"A power reserved by the constitution of a state to its Legislature, to alter, amend or repeal future acts of incorporation, authorizes the Legislature, in order 'to secure the minority of stockholders, in corporations organized under general laws, the power of electing a representative membership in boards of directors', to permit each stockholder to cumulate his votes upon any one or more candidates for directors."

Chief Justice Gray, in rendering the opinion of the court in this case, after discussing the case of *Dartmouth College v. Woodward*, 4 Wheat., 518, says:

"After that decision, many a state of the Union, in order to secure to its Legislature the exercise of a fuller parliamentary or legislative power over corporations than would otherwise exist, inserted, either in its statutes or in its constitution, a provision that charters thenceforth granted should be subject to alteration, amendment or repeal at the pleasure of the Legislature. See *Greenwood v. Freight Co.*, 105 U. S., 13, 20, 21. The effect of such a provision, whether contained in an original act of incorporation, or in a constitution or general law sub-

ject to which a charter is accepted, is, at the least, to reserve to the Legislature the power to make any alteration or amendment of a charter subject to it, which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the Legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs."

The court, illustrating the principle of law, refers with approval to the case of *Sherman v. Smith*, 1 Black, 587, where it was held that the Legislature had the right, exercising such a reserved power, to alter for the future the liability of stockholders to creditors of the corporation.

The court further says in this case:

"Remembering that the Dartmouth College case (which was the cause of the general introduction into the legislation of the several states of a provision reserving the power to alter, amend or repeal acts of incorporation), concerned the right of a Legislature to make a change in the number and mode of appointment of the trustees or managers of a corporation, we can not assent to the theory that an express reservation of the general power does not secure to the Legislature the right to exercise it in this respect."

One of the leading cases on this question, if not the leading case, is found in 21 New York, at page 9. In this case it is held:

"The provision of the general banking law reserving to the Legislature the power to alter or repeal it, forms a part of the contract with every association formed under that act, and the state may modify it, prospectively or retrospectively, without infringing the provision of the federal Constitution against laws impairing the validity of contracts. * * * Such modification may be made, it seems, as well by a change of the state Constitution as by an act of the Legislature."

Judge Denio in this case, at page 15, says:

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“The question before us is, therefore, narrowed to a consideration of the effect of the provision in the general banking law by which the right is in terms reserved to the Legislature to alter or repeal it at any time. This, according to one view, is the reservation of a right only to change or repeal it, prospectively, from the passage of the modifying or repealing law, so that the associations which had been organized in the meantime would remain unaffected by such modification or repeal. On the other hand, it is insisted that it enabled the Legislature to deal with the associations as though they were directly established by a statute containing in itself the usual reservation. I am of the opinion that the latter is the correct view. By the revised statutes, the charter of every corporation thereafter to be granted by the Legislature, was declared to be subject to alteration, suspension or repeal, in the discretion of the Legislature. This provision in incorporated itself into and became part of every special charter which was itself silent as to the power of repeal or change.”

Following the reasoning in this case it would seem that the provision of Section 2, Article XIII of the Constitution of this state would be incorporated in and become a part of the articles of incorporation of the defendant banking company in this case.

In the case of *Bissell v. Heath*, 57 Northwestern, 585, the Supreme Court of Michigan established the rule in that state that such reservation in the Constitution applies to existing corporations.

In the 5th paragraph of the syllabus of that case it is said:

“Under the power reserved to the Legislature by Const. Art. 15, paragraph 1, of amending, altering, or repealing all laws relating to the formation of corporations, the Legislature may impose on stockholders of existing corporations a liability to creditors in double the amount of their stock, and such legislation is not invalid as impairing a pre-existing contract between the stockholders and the corporation.”

In the case of *McGowan v. Donald*, 43 Pacific, 418, a California case, it is held:

“Constitution 1849, Article 4, paragraph 31, provided that ‘corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.’ *Held*, that thereunder liability of stockholders may be so changed as to impose obligations for which they were not liable when they became stockholders.”

The court, at page 420 says:

“And while the liability of the stockholder was a constituent element in the life of the corporation, and necessary to its existence, it was still only a burden imposed on the stockholder, and had otherwise nothing to do with the formation or existence of the corporation. * * * It is objected, however, that, if the provisions of the code and constitution are applicable, they impose obligations upon appellants for which they were not liable when they became stockholders, and are in conflict with that provision of the Constitution of the United States which inhibits the states from passing laws impairing the obligation of contracts, and are therefore as to them unconstitutional and of no effect. The answer to this objection is that the constitution of 1849 provided: ‘Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed.’ Article 4, paragraph 31. Under the authority thus conferred, both the Legislature and the people had power to change the law in regard to the liability of stockholders, without violating any provision of the Constitution of the United States.”

The Supreme Court of the state of Kentucky, in discussing this proposition in the case of *Bogard v. Tyler's Adm'r*, 55 Southwestern, 708, says:

“The stockholders formed the corporation on the conditions held out by the laws of the state. One of these conditions was that the act under which they were created might be amended or altered by the Legislature at pleasure, as it might deem necessary. The Legislature might, in the first place, have provided that the stockholders should be liable for the corporate

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debts; and when it provided that they should not be so liable, but reserved the right to alter or amend the law, or to repeal any grant or franchise obtained under it, those who had acted under the statute with full notice of these facts can not complain that any constitutional right of theirs is violated by the alteration of the law.”

The reasoning in that case would seem to apply to the case at bar. The stockholders formed this corporation on the conditions set forth in the Constitution of the state. While it provided there should be no double liability on the stockholders, yet the Constitution also provided that all laws under which corporations were formed might, from time to time, be altered or repealed. If the rule laid down by the Kentucky court is applicable to the Legislature it would appear that the same rule would be applicable to the people of the state in the adoption of the Constitution.

The Constitution of Ohio, at the time of the formation of the Putnam County Banking Company, provided for the passing of laws altering or repealing the laws under which corporations are created, and we think the people of this state had the right to change the fundamental law under which this corporation was created without violating any right under the federal Constitution.

Thompson on Corporations, Section 405, and Cook on Stock and Stockholders and Corporations, at page 501, state the rule of law to be as laid down by the various courts above referred to.

Reading the case of *Ireland v. The Palestine, etc., Turnpike Company*, heretofore referred to, and reported in the 19 Ohio State, we find that the corporation, the Turnpike Company, was organized under a law passed by the Legislature in 1849, when the Constitution of 1802 was in effect. Neither that Constitution nor the law under which this corporation was organized imposed any individual liability upon the stockholders beyond the amount of their subscriptions, or made any provision for the altering or repealing of the laws that were in force at the time of the formation of the corporation.

This being the case we think that the case of *Ireland v. Turnpike Company*, can be reconciled with the holdings of the courts in the various jurisdictions heretofore referred to, and that the court did not consider the question that has arisen in this case, formulating its opinion on the Constitution and laws as they stood at the time of the formation of that corporation.

In the case of *Bissell v. Heath, supra*, the Supreme Court of Michigan, referring to the case of *Ireland v. Turnpike Company*, says:

“The case of *Ireland v. Turnpike Company*, 19 Ohio State, 369, is cited by counsel as asserting a contrary doctrine. We do not find, from an examination of that case, that the effect of a reservation of the power to alter, amend, or repeal a charter was considered.”

Taking this view of the law in this case we conclude that the demurrers to the amended petition should be overruled. Each of the demurrers filed in this case to the amended petition will be overruled, with exceptions to the various defendants.

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CONSOLIDATION OF SCHOOL DISTRICTS.

Common Pleas Court of Morrow County.

EARL C. SMITH ET AL, AS THE BOARD OF EDUCATION OF THE CHES-
TER TOWNSHIP RURAL SCHOOL DISTRICT ET AL V. C. C.
CRAWFORD, COUNTY SCHOOL SUPERINTENDENT, ET AL.

Decided, October, 1919.

Schools—Limitation on Authority to Consolidate Districts—County Board of Education may not, Acting Alone, Unite a Village and a Rural District—Petition Conferring and Remonstrance Defeating Jurisdiction Distinguished—Section 4735.

1. Section 4736, General Code, is not broad enough to authorize county boards of education, by their action alone and acting under such section alone, to abolish an entire rural school district and an entire village school district and unite the two into one rural district, and to appoint a board of education for the pretended newly created district, and thus oust from office the duly elected members of the boards of education of such rural and village districts.
2. The authority conferred by said section "to create a school district from one or more school districts or parts thereof" is limited by such section in purpose to the *arrangement of school districts* "according to topography and population in order that the schools may be most easily accessible to the pupils" of the common schools; and is also limited by the provisions of General Code 4735 to a "*change*" as distinguished from an abolishment of two entire school districts.
3. There is a distinction between petitions conferring jurisdiction and a remonstrance defeating jurisdiction conferred by statute. Where jurisdiction is conferred by petition the required number of signers must appear at the time action is to be taken thereon; and by the withdrawal from the petition of a sufficient number of signers so as not to leave the required number of signers at the time action is to be taken, the conferring of jurisdiction is defeated. But, where jurisdiction is conferred by statute providing that the same may be defeated by the filing within a certain time of a remonstrance with the required number of signers, whenever such remonstrance is filed within the time, on which there appears such required number of signers, jurisdiction is defeated and can not be re-conferred by the withdrawal of some of the remonstrants.

Benjamin Olds, for plaintiffs.

Phil H. Wieland, Prosecuting Attorney, *contra*.

GALBRAITH, J. (sitting by exchange).

This is an action brought by plaintiffs as school officers of Chester township rural school district of Morrow county, Ohio, to

enjoin defendants, as the county board of education of said county, from enforcing their action and resolution seeking to combine such school district with the village school district of Chesterville, in such county, and incidentally from causing plaintiffs to turn over to the newly created board of education for the combined district, the books and funds belonging to Chester township rural school district, to enjoin such newly created board from causing and the county auditor from placing on the tax duplicate the newly created district as such, to enjoin the county auditor from making the tax levy of said newly created district, from issuing his voucher to the treasurer-clerk of said newly created district for the August, 1919, installment of the taxes now levied and collected from the taxable property within their district as it now exists, and for a mandatory injunction to require the county auditor to make the levy for school purposes upon the territory of the Chester township rural school district as it now exists and to require him to issue all vouchers in payment of taxes for school purposes for said district to Odin H. Dailey as treasurer-clerk of said Chester township rural school district, and for all other proper relief.

Without separately setting forth the pleadings—petition, answer, amendment to petition and answer thereto—or separating, and specifically rehearsing the issues presented thereby, it appears from such pleadings, by admissions, and the evidence submitted at the hearing, that the situation complained of, so far as is material for an understanding and a determination of the rights of the parties are concerned, is, in substance, as follows:

Prior to April 19, 1919, Chester township, and Chesterville—a village in such township—were separate school districts and had their separate boards of education.

On such date the county board of education of Morrow county, at a regular meeting, adopted a resolution seeking to combine such two school districts, under and by authority of General Code of Ohio, Section 4736, said newly created school district to be known as the Chester township school district; and also, immediately thereafter adopted another resolution appointing the members for the board of education of the newly created district.

Said resolutions are as follows:

“Be it Resolved, that the county board of education of Morrow county, in accordance with Section 4736, General Code,

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abolish the Chesterville village school district and the Chester township school district and create therefrom a new district known as the Chester township rural school district, the same including all the territory comprising the two aforesaid districts. And furthermore,

“Be It Resolved, that the clerk of the county board is hereby authorized to notify the boards of education of the two abolished districts of this action, and direct the two boards of education of the aforesaid districts to have their books audited and turn the same over to the newly created board of education, together with all funds in their treasuries. And furthermore,

“Be It Resolved, that the clerk of the county board be directed to file a copy of these resolutions with the county auditor and that the county auditor is hereby authorized to transfer the funds coming into the treasuries of the two abolished districts to the treasurer-clerk of the newly created district. And further,

“Be It Resolved, that the newly created board be authorized to settle all outstanding bills that have been contracted by the two abolished boards and meet any and all obligations of said boards; and also that the newly created board make an equitable division of all funds and indebtedness belonging to the newly created district.

“Moved by McMillin, seconded by Brown, that the above resolution be adopted. McMillin yes; Brown yes; Howard yes; Levering yes.

“Moved by McMillin and seconded by Howard that the following resolution be adopted:

“Resolved that the following persons be appointed as members of the board of education of the newly created district to serve until their successors are duly elected and qualified: Rolin Kunze, Elmer Sipe, Ralph Waite, Walter Alspach and Taylor Simmons. McMillan yes; Howard yes; Brown yes, and Levering yes.”

On April 22, 1919, a notice of such proceeding was mailed to the board of education of Chester township (rural) school district as follows:

“Morrow County Public Schools. C. C. Crawford, County Superintendent. Mt. Gilead, Ohio, April 22, 1919. To the Honorable Board of Education of Chester Township School District, Gentlemen:

“You are hereby notified that the county board of education of Morrow county at its regular meeting, Saturday, April 19, 1919, united the Chester township school district and the Chesterville village school district in accordance with the provisions of Sec-

tion 4736, General Code. The newly created district comprising all the territory composing the two aforesaid districts will be known as the Chester township school district. The following persons were appointed as members of the board of education of the newly created school district to serve until their successors are duly elected and qualified, Taylor Simmons, Walter Alspach, Ralph Waite, Elmer Sipe and Rolin Kunze.

“You will please have the books of the clerk of the Chester township board of education audited and turn the same over to the newly created board of education, together with all funds in the treasury. The newly created board will take up their duties at the expiration of the thirty days as provided in section above-mentioned. Respectfully submitted, C. C. Crawford, Clerk of the County Board of Education.”

After receipt of such notice by the Chester township board of education there was circulated a remonstrance in both the township and village districts, as is authorized by the section in General Code referred to, on which was secured, in each district, a large majority of the qualified electors, protesting against the combination of such school districts as proposed.

This written remonstrance was filed only a few days—possibly one day—before the expiration of the thirty days within which it could be legally filed, but it appears that knowledge of such remonstrance and of its intended filing was obtained in some way by the county superintendent of schools—the defendant, C. C. Crawford—and he, with the district superintendent for such district and a number of others—some of whom were afterward appointed by the county board as members and officers of the new board for the newly arranged district—before the actual filing of such remonstrance, circulated counter-petitions, or petitions to withdraw names of many signers of the remonstrance; and these parties, apparently, surreptitiously acted and held such counter-petitions until the actual filing of the remonstrance and till it was too late to give the qualified electors and taxpayers of these districts any notice thereof or an opportunity to fairly register their views and wishes as to the uniting of the districts.

It appears that these counter-petitions had the effect of reducing below a majority the number of qualified electors and signers of the remonstrance who resided in the village district, and in the combined districts; but, in spite of them, there was

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still a majority of protesting qualified electors residing in the rural or township district on the remonstrance.

It would extend this memoranda too much if a rehearsal of testimony establishing such conditions was to be made, so counsel and other interested parties are referred to the transcript prepared by the court stenographer.

Suffice to say, the evidence is absolutely clear and convincing and even the "cold type" discloses the interest and feeling on the part of the county superintendent, and his apparent desire to assume autocratic power, to give to the act under which he assumes to proceed its harshest construction so far as granting arbitrary power to the county board is concerned, to abolish entire school districts and to entirely override or disregard the wishes and rights of a majority of the electors of the rural school district, to abolish the school district and to oust from office the duly elected members of its board of education, to impose additional burden of taxes on the residents of such country district, and not for the purpose of advancing the schools of such district or to make any change thereof, but simply to so increase the tax duplicate for such combined school district that a new high school building might be erected in such village and a second grade high school maintained therein.

Clearly to the mind of the court this was not intended by the Legislature in their enactment of G. C., 4736, else why did they at the same time enact G. C., 4696, and later re-enact such sections by amendments, and especially safeguard and defer to the interests of the electors of the territory to be transferred.

The present G. C., 4736, was originally enacted in 104 O. L., 133 (138), and as a part of the same original act was passed G. C., 4735, 4735-1, and 4735-2.

Section 4736 was amended in 106 O. L., 396 (397), but the companion enactments mentioned remain as originally passed.

Analyzing Section 4735, it will be noted that its provision is clear that "present existing township and special school districts shall constitute rural school districts until *changed* by the county board of education, and all officers and members of boards of education of such existing districts shall continue to hold and exercise their respective offices and powers until their terms expire and until their successors are elected and

qualified." The word "changed" as employed therein, does not necessarily mean to abrogate or dissolve or abolish such districts, but merely means that such districts may be changed only.

This view is strengthened by the language employed that such existing township or special school districts shall constitute rural school districts; that is to say, they shall continue as rural school districts as they existed at the time of the adoption of said section, and shall so continue to exist until such time as the county board of education sees fit to *change* them. It does not appear to the mind of the court that the language employed in the section is sufficient to authorize the county board of education to dissolve or abrogate such districts, and to oust from their power and office the existing boards.

The amendment of G. C., 4736, in 106 O. L., 138, changed the phraseology somewhat of the original enactment in 104 O. L., 397, and yet it does not appear to the court that the amendment was to radically change its purpose.

True G. C. of Ohio, Section 4736, as it exists—under which the county board assumed to act—gives such board authority *to create a school district from one or more school districts or parts thereof*, and to appoint a board of education for such newly created school district, and to direct an equitable division of the funds or indebtedness belonging to the newly created district, and necessity might arise for such action and it could be applied in many instances without requiring an abolishment of a district and board.

It would be possible "to create" "*from one or more school districts or parts thereof*"—*parts of one or more*—without taking *all* of "one or more" and thereby abolishing "one or more," but it seems to this court that, even for such purpose, the Legislature, in the first part of such section, limited and restricted the exercise of such power and authority to meet certain conditions and purposes:

"The county board of education shall arrange the school districts according to topography and population in order that the schools may be more easily accessible to the pupils, etc."

The resolutions adopted declare no such purpose and *the evidence clearly shows such was not the purpose in the action taken.*

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Surely the first part of this act was incorporated for some purpose. Its only purpose could be to limit or restrict the action thereafter authorized.

While courts at times render decisions which tend to give to the Legislature the attribute of all knowledge, and seek to avoid a usurpation of its power by what is termed judicial legislation, still most courts recognize without question the well established rule of construction that meaning shall be given to all parts and provisions of a statute and each part construed with every other part so as to discover and maintain the intention as a whole.

Counsel for defendants call to the court's attention, as sustaining the action of the county board, the cases of *Cline v. Martin et al*, 94 O. S., 420, *Fisher v. Whittus et al*, 27 O. C. A., 349, and *Montgomery Twp. Bd. of Education et al v. County Board of Education*, 28 O. C. A., 198.

The court has made a careful examination of these cases all of which were within our appellate district and passed upon by our own court of appeals, and naturally this court would feel inclined to, and should, follow such decisions if no other question was involved in the case at bar than in the cases referred to.

Considering G. C. of Ohio, Sections 4692, 7669 (107 O. L., 624), 4682-1, 4726, 4726-1, as well as those hereinbefore referred to, all of which were passed by the Legislature for a purpose and all of which appear to seek to protect the rights and wishes of the electors of the territory to be effected, with what I have said as to my views as to a construction of G. C., Sec. 4736, I would be compelled to respectfully differ from our appellate court in its apparent conclusion that county boards are given such unlimited and arbitrary power by the last mentioned section.

It is not necessary for a decision of this case that this court should attempt to construe or apply the statutory enactments above referred to, aside from what has been said of G. C., 4736.

Considering the cases mentioned, the court is of the opinion that Judge Donahue's opinion in the Cline-Martin case (94 O. S.), does not pass upon, unless *obliter dicta*, nor determine nor attempt to determine the questions presented in the case at bar and that it is inapplicable.

Coming to the Fisher-Whittus case (27 O. C. A., 349). This was a case brought by an individual elector and taxpayer, and father of children of school age who resided with him, to enjoin the consummation of acts of the county board in creating a new school district, and the issuance and sale of bonds, the purchase of a site, and the erection of a building, for a consolidated district.

The facts are very meagerly set forth in the opinion so that it is impossible for this court to determine whether the case is in any sense parallel with the case at bar. From what appears, this court doubts that they are parallel.

The syllabus—which is supposed to be the law of the case, and approved by the court—reads:

“A county board of education has authority to dissolve two village school districts and consolidate them into one, in the absence of procedure on the part of said districts under Sections 4688 and 4688-1 which would exempt them from such action.”

Neither the syllabus nor the opinion states the section of the statutes under which the county board acted for the *consolidation*.

Incidentally, in the opinion, the court refers to G. C. of Ohio, Sections 4736, and its language in reference to the power to “create a school district,” and then states generally the court’s conclusion that “the county board has full power and authority over village districts and may create a new district by *consolidating* two village districts, unless, etc.,” but the opinion does not disclose, nor the court say, upon what possible primary action, under other permissive statutes, such power is based, nor does it definitely say that it is based alone on G. C., Section 4736.

The general purpose of the school code was to systematize courses of study, and re-arrange districts if need be to facilitate attendance of pupils, in order to advance education in the rural and village districts, and county boards were created as supervising bodies for such purposes; and not to vest in them arbitrary power to remove school officials who had been elected by the people, and make property subject to additional burden of taxation, without regard to the people’s wishes, on the mere opinion or whims of such boards, or their superintendent.

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I am inclined to think that our court of appeals in the Fisher case looked at this matter from an entirely different viewpoint, based upon other facts and conditions, and perhaps other authorities not cited in their opinion, and that they did not intend to attempt to definitely construe G. C., 4736, as would appear and as is urged by counsel for defendants herein.

Even if their court misconstrues the appellate court's intention in such case, it clearly appears that the actor therein was an individual and not the duly elected school officers of one of the districts, and that there was no remonstrance filed, as in the case at bar, of a majority of the electors and taxpayers of one or both districts

Passing now to the question of remonstrance, and counter-petitions and the case of *Montgomery Twp. Bd. of Ed. v. County Board* (28 O. C. A., 198), without attempting to rehearse such decision, the court is of the opinion the case would not be applied to the state of facts herein.

Our own appellate court in the case of *Cline v. Martin et al*, 24 O. C. C. (N. S.), 81, in the 1st syl. say:

“A court will not grant relief to a complaining taxpayer (against Bd. of Ed.) *in the absence of a showing of fraud or an intentional abuse of discretion.*”

The converse of this proposition should be true, and without rehearsing the acts of the county board and county superintendent in the case at bar, but referring parties again thereto, this court is of the opinion that our appellate court meant the converse to apply to the state of facts here presented.

Referring again to G. C., 4736, and particularly to the remonstrance provision and its effect, this court is of the opinion that whenever within thirty days after the filing of the notice a majority of the electors file a written remonstrance, then the proposed arrangement or creation of the new district does not become effective.

It is contended by defendants' counsel that after the remonstrance is filed, signers thereto can withdraw their names and thereby a new district becomes effective as though no remonstrance had been filed. It is true that the courts of this state have held that signers to certain classes of *petitions* may withdraw their names at any time before action is taken thereon.

This upon the theory that the petitions *confer* jurisdiction upon the acting body to do the thing petitioned for, and to confer such jurisdiction the required number of signers must appear upon the petition at the time the action is taken, otherwise there would not be enough signers to confer jurisdiction. This is the reasoning of the court in the case of *Hays v. Jones*, 27 O. S., p. 218, and dwelt upon by the court is the opinion on page 230, where we find the following language:

“The statute does not confer jurisdiction upon the commissioners. It designates them as the body upon which jurisdiction may be conferred; describes the persons and number who can confer it; the manner in which they may bestow it; *and the time* at which the jurisdictional facts are to be ascertained by the commissioners. If this fact is clearly determined in the affirmative and they order the road to be constructed, all things necessary towards the completion of the work may be done by the proper public agents to levy and collect from the minority as well as from the majority, the necessary amount of money for the improvement.”

Other Ohio authorities, especially those in local option election cases, are along the same lines. In the case of *Grimmell v. Adams*, 34 O. S., p. 44, it is held:

“After the jurisdiction of county commissioners, in the matter of laying out or altering a county road, has *attached* by the filing of a proper petition, etc., such jurisdiction can not be defeated by any number of the petitioners afterward becoming remonstrants against the granting of the prayer of the petition.”

The converse of the above should also be true—that jurisdiction is lost by the filing of remonstrance, and such jurisdiction once lost can not be restored by withdrawals of name of remonstrants.

See also case of *State v. Miller*, 62 O. S., p. 436, wherein it is held a member of council can not change his vote after the election of the clerk of council voted for.

The Attorney-General in an opinion held that remonstrants could withdraw their names. While such opinion has not the weight of a decision, it is entitled to consideration, but an examination of his opinion discloses that he relied upon the authorities permitting a petitioner to withdraw his name and

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failed to distinguish between a petition conferring jurisdiction and a remonstrance defeating jurisdiction.

In the opinion of the court there is a difference between a case where jurisdiction is conferred by a petition and one where it is destroyed by a remonstrance, in this, that to confer jurisdiction the required number of signers must appear at the time action is to be taken thereon, but in the case of a remonstrance, *wherein no further action is to be taken by the acting body*, all that which preceded it becomes of no effect immediately upon the filing of the remonstrance, and all jurisdiction is thereby lost and can not be re-conferred by the withdrawal of some of the remonstrants; for in the case of petitions jurisdiction is conferred by the petition, while in the last mentioned line of cases jurisdiction is conferred by the statute and taken away by filing a remonstrance. See *State v. Trenton*, 36 Atlantic, 685, *Armstrong v. Ogden City*, 43 Pacific, 119.

The case of *Brodhead v. Flemington*, 88 Atlantic Reports, p. 826, is directly in point with the question at bar. Therein it was held that the filing of a remonstrance at any time within the period fixed by law terminated all authority in the matter and the withdrawal of names from the remonstrance does not re-confer authority.

In the opinion, the court on page 827 say that cases in which, owing to the legislative language, the *application* or *remonstrance* must speak as *of the time* when it is officially presented to the governing body and cognizance taken of it, have obviously no application to the present case, where the Legislature has itself prescribed the critical event to be not the taking of *cognizance* by the governing body, but the *filing* of the required remonstrance with a specified official.

This, it would appear to the court, is the language and meaning of Section 4736. The critical event under that section is not the taking of cognizance of the remonstrance by the county board, but the filing of the required number with the county board. The proposed re-arrangement of a school district becomes of no effect as soon as the required number have signed a remonstrance and filed it *at any time* within said thirty days. This may be on the first day or the last day, and when once filed the arrangement becomes ineffective and to withdraw some

or all of the names on the remonstrance does not make the proposed arrangement effective for that would be re-creating a jurisdiction which had been lost or creating a jurisdiction which is only given by the statute.

In the state of Missouri we find two apparently contrary opinions on the right to withdraw from a remonstrance.

The first case is that of *Sedalia v. Scott*, 78 S. W., 276, by the Court of Appeals of Kansas City wherein it was held that jurisdiction was ousted by the filing of a remonstrance signed by the majority of property owners and the same can not be reconferred by a portion of the signers thereafter withdrawing from the protest. The other case is that of *Sedalia v. Montgomery*, 88 S. W., 1014, by the Court of Appeals of St. Louis, and as this brought about conflicting opinions the last case went to the Supreme Court of Missouri, and is found in 127 S. W., page 50.

The Supreme Court of Missouri in commenting on these two cases found it necessary to construe the statute and to determine whether the statute conferred the jurisdiction in the first instance or conferred it only conditionally, and in construing the statute and commenting on the two opposite opinions the court say:

“If the statute confers on the city council, *in the first place*, the complete jurisdiction to cause the street to be reconstructed at the expense of the owners of abutting property, but authorizes a majority of the property owners to annul that authority in a given case, by filing their remonstrance, then *when* the remonstrance is filed the jurisdiction in that case is annulled, and the remonstrators can not by withdrawing the remonstrance re-confer the jurisdiction.

“But, on the other hand, if the statute does not confer on the city council, *in the first instance* complete jurisdiction, but confers it only conditionally—that is, confers the right to propose by an appropriate resolution *to do the act*, subject to the will of the majority abutting property owners, such will to be expressed within a given period, then the jurisdiction over the subject matter is in abeyance until that period has elapsed.”

That court holding that under said statute the power on the part of the city council *to do the act proposed* is not conferred *until* the lapse of the period within which remonstrance may be filed, and in construing said statute says further:

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“In other words, the statute in effect says to the city council; *You may make the improvement* suggested by the resolution, provided a majority of the abutting property owners are willing, and you may have ten days in which to ascertain that fact, *and if at the end* of that period there is not before you a remonstrance signed by a majority of the property owners you may infer that it meets their approval, and *then, but not until then, your jurisdiction attaches.* During that period, therefore, there is no power or jurisdiction either to annul or to be re-created.”

A careful reading of the Missouri opinion to the court's mind supports the position that where the *statute* confers jurisdiction the remonstrance annuls the jurisdiction and can not be re-conferred by having signers withdraw therefrom, but only in cases where power *to do the act* proposed is not conferred until the lapse of time within which remonstrance may be filed can there be withdrawals therefrom, and this upon the theory (similar to cases of petition) that jurisdiction is to be determined by the conditions at *the time* the same is about to be *exercised*.

The Missouri section under consideration, which is as follows:

“And if a majority of the resident owners of the property liable to taxation therefor shall not within thirty days thereafter file with the clerk their protest against such improvement *then the council shall have power* to cause such improvement to be made,”

is very different from Section 4736 under which the county board does nothing but propose an arrangement with nothing to do thereafter. No action whatever either upon the remonstrance or otherwise, is to be taken by the county board after they have passed a resolution and given notice to the local boards of education. When they adopt this resolution and give the notice their power and jurisdiction is exhausted and the filing of a remonstrance at any time within the thirty days annuls the resolution and no withdrawals can restore it.

In case of *Loomis v. Bailey*, 45 Iowa Supreme Court, 400, on the subject of re-location of a county seat, it was held that the board of supervisors are not authorized, if a petition and remonstrance have been presented to them respecting a change in the location of a county seat, to consider an application by *any*

number of signers that their names be stricken from the remonstrance.

In the last mentioned case the court criticises the practice where men are solicited to withdraw their names from a remonstrance, thus compelling other remonstrants to be obtained and thereby causing bitterness in a community, and they speak of the mischief that can arise from permitting withdrawals; that the peace of communities and the good of the people forbid such methods of causing bitterness and opportunities for unfairness to be introduced.

And in the case of *Brewery Co. v. Jersey City*, 42 N. J. Law, 575, the court, on page 577, in speaking on the same subject says: That it may be that others who decide to object refrain from doing so upon ascertaining that a sufficient remonstrance was already filed, and intimate that the proper method is not to permit withdrawals, but to institute new proceedings and give the required notice to the public, *de novo*.

It seems to this court that G. C., Section 4736, *should not be construed in such a way that trickery must be resorted to in order to obtain benefits or rights thereunder*, but should recognize the right of a remonstrance filed in good faith, and cause remonstrators to feel that they will receive a square deal when their remonstrance is filed. If a remonstrance speaks only from the last day of the thirty, then a remonstrance must be held off the files until two or five minutes before the expiration of the last day so as to prevent any withdrawal. Surely the law should not be so construed, but should be construed to mean what it says, so as to permit people to file their remonstrances at any time, and to know that when they have filed it they may go to their homes feeling secure that their rights have been preserved. It may often happen that more than the fifty per cent. are opposed to a new arrangement of school districts, but it is not necessary that more than that number sign a remonstrance, for as stated by the New Jersey Supreme Court, some who are opposed refrain from signing and do not take the time to object when they ascertain that a sufficient remonstrance was already signed.

The thirty day period fixed in Section 4736 is not, strictly speaking, a referendum. For a referendum is a method of

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submitting a legislative or other measure to a direct vote of the whole people, and in such cases the whole people are asked to give their expression at a certain time. If this had been submitted to the whole people at a certain time and fifty per cent. had voted against it, could it be said that any part thereof might change their vote so as to change the result? This could not be done unless the question be re-submitted to the whole people at another time.

Under 4736 the county board has nothing more to do after passing the resolution and giving the notice. While it is authorized to appoint a board of education for a newly created school district, it requires no action on their part on the filing of the remonstrance; for such authority to appoint a board of education is also conferred upon the county commissioners under 4736-1.

Referring again to the Ashland County case, the court, in the syllabus, say:

“Electors signing a remonstrance against the *re-arrangement* of the school districts are at liberty to withdraw their names at any time within the thirty days, *or until official or judicial action has been taken.*”

This latter, underscored, portion might indicate that the names could be withdrawn after the thirty day period.

If so, such holding would be in direct conflict with opinion of Henry County Court of Appeals decision in the case of *Hartman v. Darby et al* (unreported), in which it was held that the withdrawal of names from a remonstrance after the period of thirty days time prescribed in G. C., 4692, is of no effect; and further held that no authority is by statute conferred upon the county board to determine the validity of a remonstrance.

Counsel for defendants, herein, called to the court's attention an appellate court decision in Crawford county—*Lyons v. Jenner et al* (unreported)—in which the Supreme Court overruled a motion to certify record, and in which the appellate court stated the holding was that signers of a remonstrance might withdraw their names, but as this court has no information as to the conditions and facts upon which that decision was rendered it is compelled to entirely disregard it.

It was suggested by counsel for defendants that the county board took the action they did, on account of some letter from state authority stating that unless a new high school building was erected in the village of Chesterville and new equipment provided, that its second grade high school would have to be discontinued; and that for such reason, to increase the tax duplicate and to enable the accomplishment of such requirement such action was taken for the benefit of pupils in the village and township who desired to attend a high school.

The desire to provide such building and equipment was natural; the purpose was commendable; but the method of accomplishment, or seeking to attain it, is to be condemned.

From all the evidence submitted, and the statutes and decisions called to my attention and examined, I am of the opinion that G. C. of Ohio, Section 4736, does not confer on the county board the authority sought to be exercised by it—to abolish two entire school districts and oust from office their boards and to create a new and distinct district by uniting all of such territory, and appoint a new board therefor; and that even if such authority was given by the statute, that the filing of a remonstrance by electors revoked the board's proposed action; that because of the methods adopted by the county board and superintendents in securing petitions to withdraw names—which was in the nature of a fraud and abuse of the purpose and statutory intendment—such so-called petitions should be disregarded by a court of equity, and the remonstrances as originally signed and filed should be considered as meeting the requirement of the statute to dissolve or rescind the attempted action of the county board.

Therefore the finding on the issues joined is in favor of plaintiffs, and the injunction is allowed and made perpetual, both restraining and mandatory, fully as prayed for in plaintiff's petition. Costs assessed against defendant, the county board of education. Entry may be prepared accordingly and exceptions noted. Amount of appeal bond \$500.

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Uhlman v. Sherman et al.

**REGULATION OF THE SALE OF ADVERTISING SPACE
IN NEWSPAPERS.**

Common Pleas Court of Defiance County.

FRED W. UHLMAN V. MIRON C. SHERMAN ET AL.

Decided, September, 1919.

*Newspapers—Obligations Involved by Reason of Their Public Character
—Discrimination Can Not be Practiced in Sale of Advertising Space
—But Reasonable Regulations by Publishers not Open to Attack.*

While the statutes providing penalties for violation of civil rights do not apply to or affect newspaper publishers, the quasi public character of a newspaper requires that if advertising space is sold to one or more of a certain class it must be sold to others of that class who may desire such space and are willing to comply with reasonable rules as to the character and length of the announcements offered and tender the customary fee therefor.

Benj. F. James and Harris & Shaw, for plaintiff.

*Jno. W. Winn, Jno. P. Cameron and Richard H. Sutphin,
contra.*

HAY, J.

Plaintiff in his petition alleges, in substance, that he is now and since April, 1917, has been conducting a general mercantile business in the city of Defiance, Ohio; that the defendants, Whitaker, Sherman and Vandebroek are competing merchants in said city; that the Crescent Printing Company is an Ohio corporation publishing a daily and a weekly newspaper in said city.

That said three competing merchants in April, 1917, conspired and have ever since conspired together to prevent and by threats, coercion and persuasion have prevented said Printing Company from receiving and publishing the business advertisements of

plaintiff, to the great and irreparable injury of said Fred W. Uhlman.

Plaintiff prays that said competing merchants be enjoined from so persuading, coercing or intimidating said printing company and that a mandatory injunction be issued restraining said company from refusing to accept from plaintiff proper and legal advertisements of his said business.

Said three competing merchants file answers denying any such conduct or conspiracy on their part, but said Crescent Printing Company has, as yet, filed no answer.

This cause was heard and submitted on a motion by plaintiff for the allowance of a temporary restraining order against said Whitaker, Sherman and Vandebroek and the issuance of the mandatory injunction asked for against said printing company.

As to conspiracy branch of the case we find that there is no evidence substantiating the charges made in the petition against the three competing merchants, or either or any of them. Suffice to say that each one of them in his testimony emphatically denies any conspiracy, coercion, threats or intimidation, and Mr. Tustison, the manager of the printing company, corroborates their testimony. Both Mr. Whitaker and Mr. Sherman gave their reasons why they considered some of the business methods of plaintiff unfair to the general public and competing merchants. Mr. Sherman expressed his views to Mr. Tustison, but made no threats of any withdrawal of patronage. The action of the manager of the printing company in this matter seems to have been voluntary and based on what he considered the best interest of his company.

The other branch of the case introduces a novel question: can plaintiff compel this printing company to accept and publish his business "ads" on payment of the ordinary and regular rates therefor? In other words, under the circumstances shown by the evidence, has this court the power to issue the mandatory injunction asked for? Learned and diligent counsel on both sides were unable to find a parallel case. We have also been unable to find one. Therefore in assisting to establish such

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precedent as may be established in this case, we must try to ascertain what are the respective rights of the plaintiff and this newspaper company under the laws of Ohio.

That the printing company is a corporation cuts little figure. Private individuals could conduct these two newspapers without the aid of any articles of incorporation. Its charter from the state confers upon it no extraordinary rights or privileges, not common to any private corporation. The main objects of incorporating were probably perpetuity and limitation of liability.

Ordinarily, persons can not be forced into contracts. There is absolute freedom on the part of each party negotiating to accept or reject the offer made by the other.

The Supreme Court of Ohio, *In Re Steube*, 91 O. S., 139, quotes Sec. 1, Art. 1 of the Constitution of Ohio, and then says:

“The right to contract is recognized as a property right essential to the acquisition, possession and protection of property.”

Why, if at all, can the publisher of a newspaper be compelled to become a party to a contract not to his or its liking?

The carefully prepared brief of counsel for plaintiff was evidently designed to meet the other branch of the case, and this branch was not discussed. However, in argument, counsel claimed the printing company stood in the same position as a proprietor of an inn or theater, and also that it was a *quasi* public corporation and the moment it sold any of its advertising space to merchants competing with plaintiff, it immediately became bound to accept plaintiff's “ads.”

We will consider these two claims separately.

First. Does the publisher of a newspaper stand exactly in the same relation to the general public as the keeper of a hotel or the manager of a place of amusement? We think not.

Section 12940 of the General Code of Ohio under the chapter pertaining to “Violation of Personal Rights” provides as follows:

“Section 12940. Whoever, being the proprietor or his employee, keeper or manager of an inn, restaurant, eating house, barber shop, public conveyance by land or water, theater or other place of public accomodation and amusement, denies to a citizen, except for reasons applicable alike to all citizens and regardless of color or race, the full enjoyment of the accommodations, advantages, facilities, or privileges thereof, or, being a person who aids or incites the denial thereof, shall be fined not less than fifty dollars nor more than five hundred dollars or imprisoned not less than thirty days nor more than ninety days, or both.”

Section 12941 reads as follows:

“Section 12941. Whoever violates the next preceding section shall also pay not less than fifty dollars nor more than five hundred dollars to the person aggrieved thereby to be recovered in any court of competent jurisdiction in the county where such offense is committed.”

These statutes providing penalties for the violation of the civil rights of citizens do not include or affect a newspaper publisher.

We come now to the second contention that the Crescent Publishing Company is a *quasi* public corporation and by virtue of the fact that it sells advertising space to one or more in a certain class that it must also sell such space to others of that class if they desire it.

This claim is founded on the theory that the defendant printing company is so “affected with a public interest” that it is a *quasi* public corporation.

Section 570 of Elliott on Contracts treats of such corporations as follows:

“There is a class of corporation so ‘affected with a public interest’ that they are often called *quasi* public corporations, although they are private corporations rather than public in the true sense. Railroad companies, street railway companies, canal companies and turnpike companies are of this character. So are gas and water companies, telegraph and telephone companies,

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heating companies and the like. The general principles of the law of contracts already considered, apply in the main where such corporations are parties as well as other cases; but there are some distinctions and some peculiar applications of the rules to their contracts, which are more subject to legislative control, in some respects, than those of ordinary strictly private corporations; and they have public duties to perform that may limit the power to contract, or even require them to contract, in effect at least, in certain instances."

In Section 571 the author further says:

"In general, a corporation affected with a public interest has all the attributes and incidents of a private corporation, and as a general rule is accorded the same measure of legal constitutional protection for itself and its members as is given a private corporation. But contracts entered into by a *quasi* public corporation, in the discharge of its public duty, may differ fundamentally from the ordinary contract and the rules which govern it. The relation between a public service corporation and its patrons is consensual. But there is this difference; the corporation must accept the application of the would-be patron, if it is one he is entitled to make and if he complies with the reasonable rules of the company."

We can readily see why this rule applies to a railroad company, a gas or water company, a light or heating company, or a telegraph or telephone company, or any common carrier or other corporations receiving from the state the right of eminent domain, or other valuable rights or privileges.

In some cases, however, it is difficult to decide whether or not a business has become clothed with a public interest so that its patrons should not be discriminated against.

In the mass of litigation concerning such claims it has been held that public wharves, grain warehouses, grist mills, fire insurance, stock yard companies, grain elevators, hack lines, theaters and other public places of amusements are kinds of business affected with a public interest.

In the case of *McCarter, Atty. Gen., v. Firemans Insurance Company et al*, a New Jersey case, reported in the 73rd Atlantic

Reporter, page 80, the court attempts to define, as nearly as possible just when a business becomes clothed or affected with a public interest.

Whether the business of fire insurance is a business affected with a public interest, the court say:

“The answer to this question does not depend, as counsel for the respondents argue, upon whether the defendants were expressly created as public agents, or whether the state has expressly charged them with the performance of a public duty, or has to that end clothed them with monopolistic privileges or granted to them its right of eminent domain, or required that they insure the property of citizens alike. These are indicia by which the existence of ‘a public interest’ may be readily discerned, but, so far from ‘the public interest’ arising out of these incidents, the fundamental fact is, that they arose out of such public interest. In natural course the public interest first arose, and afterwards, and because of such interest, all of these incidents were added unto it. In their inception all public callings were private ones, whose history has consisted in the evolution of a public character and of the incidents that they now possess. ‘First the blade, then the ear, after that the full corn in the ear.’

“Such at the common law was the course by which common carriers, and all of the callings now recognized as affected with a public interest, ceased to be *juris privati* only, and became matters of public concern. More than two centuries ago Lord Chief Justice Hale said that when private property is affected with a public interest, it ceases to be *juris privati* only, and illustrated this by the case of a man who sets up a crane in his yard that in due course ceases to be *juris privati* and becomes subject to public regulations. This statement of Lord Hale was cited with approval and applied by Lord Kenyon a century later ‘and has’ said Chief Justice Waite speaking for the Supreme Court of the United States ‘still a hundred years later, been accepted without objection as the law of property ever since.’ *Munn v. Illinois*, 94 U. S., 113. ‘Property,’ Chief Justice Waite continues, ‘does become clothed with a public interest, when used in a manner to make it of public consequence and affect the community at large.’ When therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created.”

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The court goes on to speak of the business of fire insurance, its growth and regulations and says:

“It seems to me that it is impossible to say that by its very growth and success, the business of fire insurance has not become affected with a public interest within the principle of *Munn v. Illinois*. That it is deemed for legislative purposes to be so affected, is evident from the voluminous code created in this state for its regulation in the interest of the public.”

* * * * *

“The conclusion we reach from these considerations is that the business of the defendants is in point of fact one that directly affects the interest of the public, and that such public interest has been recognized as a subsisting one by the Legislature of this State, and that in point of law the business of the defendants is affected with a public interest.”

* * * * *

“Upon the underlying proposition that a business, private at its inception, may become affected with a public interest, it is immaterial that the question of its public character arose in a case where its restraint had been legislatively rather than judicially determined. Upon this point, *Munn v. Illinois*, as was said by Chief Justice Waite, introduced no novel departure. What it did was to call attention to the fundamental relations that existed between the use of private property and the creation of a public interest in such use, and its chief value as a contribution to jurisprudence was that it pointed out clearly, that in the determination of such a relation, the underlying question was not what the state had done to impress a public interest upon a business, but what the owners and operators of such business had done to draw to, and thus clothe themselves with a public interest; for in *Munn v. Illinois*, the state had done absolutely nothing. The vast importance of the maintenance of this point of view by the courts of the country must be conceded when we consider that to an unprecedented extent business enterprises are launched the success of which depends upon the extent to which the public can be attracted to them and constrained to lean upon them. Public support of this character is essential to the success of these enterprises, and hence is from their inception the *desideratum* of their promoters. When, therefore, success along these lines has been attained, it brings with it duties to the public, whose interests are involved, of precisely the same nature as if such duties had been imposed by

public law upon such enterprises at their inception. This was the principle that was recognized and applied in *Munn v. Illinois*, and if it be sound as applied to individuals, it must *a fortiori* be sound as regards corporations."

Now to apply these principles to the instant case. Newspapers in this country have become universal. They are now practically in every home. They give to the people daily the news from all quarters of the globe. They gather and publish the many items of local news so much desired by the people of the particular locality in which they are printed. They publish the weather reports, the market reports and the hundred and one other things which the people desire to read and know. They are favored by the law with the publishing at a liberal price of sheriff's sales, financial reports of city and county officers, sales of county and municipal bonds, notices of the reception of bids for public contracts, rates of taxation, appointment of executors and administrators and many other public notices of various kinds.

These all add to the interests of the public in the business and serve to make it a success, and cause the public to depend upon the newspapers not only for knowledge of current events, both local and foreign, but also for a knowledge of these matters of public concern which vitally affect every citizen and taxpayer.

The General Assembly of Ohio has passed scores of statutes requiring notices of various kinds to be published in newspapers of the state. It has defined a square. (See Section 6254, G. C.) It has fixed a maximum rate to be charged for such printing. We think courts must take judicial notice of the many public favors which have thus been extended to the newspapers of the state. While the legislation usually requires such notices to be published and it would seem to be mandatory upon newspaper publishers to publish such notices, yet Section 10221 of the General Code provides:

"When it is provided by statute that a notice shall be published in a newspaper, and no such newspaper is published in

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the county or other place mentioned, or, if it is published there, and on tendering of his usual charge for a similar notice the publisher refuses to insert it in his newspaper, then a publication in a newspaper of general circulation in the county or other place mentioned shall be sufficient.”

This section of the code provides in case of a refusal by the home paper to publish a public notice that such notice may be published in some other newspaper of general circulation in the county or municipality where such notice should be published. No provision is made, however, for such a case as would arise if all newspapers having a general circulation in such county or place should refuse to publish such “ads.”

While the General Assembly by its generous provisions for the payment of such published “ads,” evidently has had little fear of any refusal on the part of all newspaper publishers, coming within the category required, yet while such a general refusal is not probable, it is not impossible.

While our Legislature has not gone so far as to say that such notice shall be published by newspapers printed within the localities where such notices are required to be published, and to impose a penalty for any refusal on their part to so publish them, yet we hardly think any lawyer will contend that such newspapers could not be required to publish such notices, providing the fees fixed therefor were reasonable.

We believe that the growth and extent of the newspaper business, the public favors and general patronage received by the publishers from the public, and the general dependence, interest and concern of the public in their home papers, has clothed this particular business with a public interest and rendered them amenable to reasonable regulations and demands of the public.

If we are right in this conclusion, and the proper authorities in the county and municipal corporations could enforce without further legislation, the publication of notices required by statute, in case of a unanimous refusal, what is the status of a local merchant whose advertisements are refused when the “ads” of other merchants in the same class are received?

Our Legislature has spoken in reference to inns, barber shops, hack lines, theaters and other places of public accommodation, but it has not yet spoken as to the newspaper business. The highest courts in the land say, however, that if the particular business in question has assumed such proportions and importance in a state or locality that under the well-established rule it has become affected with a public interest, then the rights of the public in dealing with such corporations may be enforced in court, even though the legislative department of the state has not yet gone that far in seeking to regulate such business.

Is it reasonable to say that warehouses, public wharves, hack lines, ferries and many kindred lines of business are of more concern and importance to the public than the newspaper business?

We are of the opinion that it will be difficult to find any one line of business in the present age of the world which is of more vital interest and concern to the general public than the newspaper business. It is a moulder of public opinion, the general medium by which local and foreign news is conveyed to its patrons, the vehicle which carries to the people of the locality in which it is circulated, the most vital facts concerning its governmental matters.

It is the best advertising medium for local merchants. By general custom, the merchant speaks through it to his patrons, and the purchasing public uses it as a medium to select its places of purchase.

We therefore believe that a newspaper company when it has advertising space to sell has no right to discriminate against a local merchant who in his application for advertising complies with the law and the reasonable rules of said newspaper company in reference to the character of his advertisement, and tenders the regular and ordinary fee charged therefor by said paper.

We do not intend to hold that a newspaper company may not reject some class or classes of advertising entirely, or that it may not use reasonable discretion in determining whether or not an advertisement presented is a proper one. We believe

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that a newspaper company may determine how much of its space it will sell for advertising purposes and how much it will devote to reading matter; that when its advertising space is sold, it would not be any discrimination to refuse further applications for space. We are of the opinion, however, that the rules should be reasonable and applicable to all persons in the same class.

In this case, if it is the rule of the defendant printing company not to accept from any merchant advertisements of sales of the so-called bankrupt class of merchandise, then it would be no discrimination against the plaintiff to refuse to receive that character of an advertisement from him. We hold, however, that whenever the defendant printing company has advertising space to sell and the plaintiff in his application for advertising space complies with the law and the reasonable rules of the said company as to the kind and character of the advertisement offered, and tenders the regular and ordinary fee therefor, that the printing company is bound to accept it.

We think perhaps that the mandatory injunction prayed for might be allowed on a motion for a temporary order in some cases where serious damage would occur to the applicant if the issuance of the mandatory injunction was delayed until the hearing of the case on its merits. We do not think any such case of damages was shown on this hearing as necessitates the issuance of a mandatory injunction as prayed for in the petition at this time, but we have gone into the case fully so that counsel may have the benefit of our views in the final hearing of the case upon its merits.

The temporary restraining order against the three merchants will be refused and the mandatory injunction asked for against the printing company will be denied at this time.

The defendant printing company, if it desires, may have leave to answer by the first Saturday of February.

An entry may be drafted accordingly.

ESSENTIALS TO THE RELATION OF PASSENGER AND CARRIER.

Common Pleas Court of Cuyahoga County.

MAY DOWD v. CLEVELAND RAILWAY.

Decided, April Term, 1918.

(Judge William F. Duncan, of Hancock County.)

Carriers—Duty of Exercising the Highest Degree of Care—Begins in the Case of an Intending Passenger, When—Corresponding Degree of Care Required in the Case of an Alighting Passenger.

1. The relation of carrier and passenger begins when a person, intending in good faith to take passage and with the express or implied assent of the company places himself in a position necessary to avail himself of the privilege. He is then entitled to the exercise of the highest degree of care by the company for his safety.
2. Having boarded a car, this relation and corresponding duty continues until he is safely landed in the street, notwithstanding the fact that he changes his mind and attempts to leave the car before it starts; and the company is liable if, when he is on the lower step of the car and about to alight, the motorman starts the car with a sudden jerk and he is thus thrown to the street and injured.

*Affirmed by the Court of Appeals.

Payer, Winch, Rogers & Minshall, for plaintiff.
Squire, Sanders & Dempsey, contra.

DUNCAN, J.

Heard on motion for judgment or new trial.

This is a personal injury case. It was tried early in the term and the plaintiff was given a verdict in the sum of \$1,000. The defendant now moves for judgment in its favor upon the

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special finding of a particular fact; and if that is denied, that a new trial be ordered for error in the charge of the court. There are other errors alleged in the motion for new trial, but this is only one urged in argument.

The defendant company owns and operates a system of electric railways in the city of Cleveland, and on the day in question, the plaintiff boarded one of its west bound cars at 36th street, but having changed her mind, attempted to leave the same before it started—when, by stepping off or being thrown off, she fell to the pavement of the street. The general verdict of the jury was to the effect that she was thrown off by the negligence of the motorman in starting the car with a jerk when she was on the lower step about to alight.

In response to the instruction of the court, given upon request of the defendant, the jury specifically found that the plaintiff fell with her head to the west—the same direction in which the car was moving. And it is urged here that this finding is inconsistent with the general verdict, controls the same and calls for a judgment for the defendant. This I can not agree to. If the plaintiff had hold of one of the handles when the car jerked, it would be quite natural that she should fall with her head to the west. Or, if the car jerked while she was stepping off with her left foot forward, she would naturally fall in that direction, head first. The jerk of the car threw her out of her balance and she fell towards the side on which her footing gave away. Walking is a process of falling and she naturally fell in the direction in which she lost her foot-hold.

Among other things the court instructed the jury as follows:

“Under the law, the plaintiff became a passenger on this car when she boarded the same at 36th street, and she must be regarded as a passenger until after she alighted therefrom. While a passenger, the company owed to her the highest degree of care commensurate with the practical operation of its railway under the existing conditions, and the company is liable for its negligent failure to exercise such care, if by reason thereof the plaintiff received any of the injuries of which she complains, unless contributed to by her.”

This, it is claimed, was error; that she ceased to be a passenger when she changed her mind and attempted to leave the car, upon which, the measure of duty the company owed her changed from the highest degree to ordinary care.

It is conceded that the relation of carrier and passenger begins when a person, intending in good faith to take passage, and with the express or implied assent of the company, places himself in a position necessary to avail himself of the privilege. *Holzenkamp v. Cincinnati Traction Co.*, 2 N.P.(N.S.), 157, and cases there cited; *Cincinnati Traction Co. v. Holzenkamp*, 74 Ohio St., 379; *Dewire v. Boston & Maine Ry.*, 148 Mass., 343 (19 N. E., 523); *Klinck v. Chicago City Ry.*, 104 N. E., 669; *Karr v. Milwaukee, L. H. & T. Co.*, 132 Wis., 662; *Smith v. St. Paul City Ry.*, 32 Minn., 1, 18 N. W., 827.

And when he boards the car it is presumed that he is able and willing to pay his fare and that he will do so upon request. *Chicago, R. I. & P. Ry. v. Lee*, 92 Fed., 318; *McKimble v. Boston & Maine Ry.*, 2 N. E., 97; *Gabbert v. Hackett*, 115 N. W., 345.

The plaintiff had boarded the car and having thus become a passenger, when did that relation cease? Did it cease when she changed her mind, or when she alighted from the car? It must be conceded that under the general rule the relation does not cease until the passenger has alighted, at least, and has both feet squarely on the ground. *McKimble v. Boston & M. Ry.*, *supra*; *Serviss v. Ann Arbor Ry.*, 135 N. W., 343; *Craig v. St. Louis U. Ry.*, 158 S. W., 390; *Denver City T. Co. v. Hills*, 116 Pac., 125; *Chicago, R. I. & P. Ry. v. Wood*, 104 Fed., 663. To my mind the principle is no different than where a person boards the wrong train by mistake and desires to leave it. That she wanted to leave it is the test and not the reason why. In this behalf it is held in *Cincinnati, Hamilton & I. Ry. v. Carper*, 13 N. E., 122, that a passenger who enters the wrong train through mistake is entitled to protection as a passenger while in the train and alighting therefrom. Judge Elliott rendering the opinion cites as supporting this doctrine *Columbus, C. & I, Central Ry. v. Powell*, 40 Ind., 37; *Railroad Co. v. Gilbert*, 22 Am.

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& Eng. Ry. Cas., 405; Railway Accident Law, 215; 2 Wood Railway Law, 1047, and concludes:

“The deceased was therefore entitled to be treated as a passenger while on the train, and a high degree of practicable care to protect him from injury was due to him from the carrier.”

As supporting this proposition, see 4 R. C. L. 1021, Sec. 483, and the following cases: *Finnegan v. Chicago, St. P., M. & O. Ry.*, 51 N. W., 122; *Lake Shore & M. S. Ry. v. Rosenzweig*, 6 Atl., 545; *Arnold v. Penn. Ry.*, 8 Atl., 213; *International & G. N. Ry. v. Gilbert*, 64 Tex., 536; *St. Louis S. W. Ry. v. Pruitt*, 79 S. W., 598; *Ft. Worth & R. G. Ry. v. Dubose*, 171 S. W., 1090; *Boggess v. Chesapeake & Ohio Ry.*, 16 S. E., 525; *Johnson v. Seaboard Air Line Ry.*, 79 S. E., 91.

I have been able to find no case to the contrary, and none has been cited to which I have access. In the cases cited as holding the contrary doctrine, it was held in each instance that the peculiar facts of the case did not constitute the plaintiff a passenger at any time, and, of course the rule calling for the highest degree of care, at no time applied. I refer to the following cases: *Webster v. Fitchburg Ry.*, 161 Mass., 298, 37 N. E., 165; *Jones v. Boston & Maine Ry.*, 39 N. E., 1019; *Robertson v. Boston & N. St. Ry.*, 76 N. E., 513; *Scott v. Cleveland, C., C. & St. L. Ry.*, 43 N. E., 133; *McKinley v. Louisville & N. Ry.*, 127 S. W., 483; *Griswold v. Chicago & N. W. Ry.*, 26 N. W., 101.

The relation arises by the implied contract of offer and acceptance—the offer of the plaintiff and its acceptance by the company. By the terms of the contract the plaintiff had the right to terminate it at any stop or at the stop where it began, the conductor or motorman having notice of her intention to do so. She exercised her option and terminated it at the same stop where she got on, and the jury found that the motorman saw the plaintiff on the step, or in the exercise of ordinary care, in the performance of his duties, should have seen her there, and that she was negligently thrown off the car by a sud-

den jerk forward, thus causing her to fall and to sustain some of the injuries complained of.

And if the company was bound by its acceptance of the plaintiff as a passenger to exercise the highest degree of care for her safety, that duty continued as long as he continued under its control. The degree of care therefore, which the company was required to exercise towards her did not change with the change of her mind, until she alighted upon the street, to say the least.

Holding these views, the defendant's motion for judgment will be overruled and its motion for new trial denied. Judgment for plaintiff on the verdict.

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Kinsinger et al v. Board of Education.

**SCHOOL BUILDINGS EMERGENCY STATUTE REPEALED
BY IMPLICATION.**

Common Pleas Court of Logan County.

**SAMUEL A. KINSINGER ET AL V. THE BOARD OF EDUCATION OF
THE DE GRAFF VILLAGE SCHOOL DISTRICT, ET AL.**

Decided, October 13, 1919.

*Constitutional Law—Substitution of New Board by Reference—Renders
Part of Two Sections of Industrial Commission Act Invalid—School
Buildings Emergency Statute Repealed by Implication—Defective
Procedure in the Revival or Amendment of Acts—Roll-Call of In-
dustrial Commission Necessary to Give Effect to Its Orders.*

1. An owner of land which has been transferred from a rural to a village school district is estopped from denying the legality of the transfer, after acquiescing therein for a period of three years, in the meantime taxes in the village school district on said land and participating in the elections which have been held in said district.
2. In the absence of a showing of gross abuse of discretion on the part of the school board, in determining to acquire a new site and erect new buildings rather than to repair and re-equip the old buildings condemned by the Industrial Commission, a court is without authority to interfere.
3. Section 871-11, in so far as it attempts, by reference only, to provide for a transfer of the powers and duties of the chief inspector of workshops and factories to the Industrial Commission, is unconstitutional and void; and that part of Section 871-24 which attempts to confer upon the Industrial Commission the said powers and duties theretofore performed by the chief inspector of workshops and factories is void for the same reason.
4. Section 7630-1, known as the "emergency statute for school building purposes," was repealed by implication from and after September 1, 1913, and has not been revived or re-enacted, and is not now a law.
5. The Industrial Commission, in attempting to exercise authority in so important a matter as an emergency tax levy must act in the manner pointed out by the statute, which requires that there be a separate vote in the form of a roll-call and a separate record to render the passage of an order legal.

John E. West, for plaintiffs.

F. G. Long, for defendants.

HOVER, J.

It appears that the industrial commission of Ohio, by action of one of its departments, condemned the school house of the De Graff village school district; and that there was not in the treasury of the board of education of that district sufficient funds to make the repairs required. Whereupon, the board of education, by its resolution, and in the exercise of its discretion, decided to buy a new site and to erect a new school house. By virtue of such resolution an amount of tax exceeding the authorized levy would be necessary, and the board decided to issue bonds in the sum of one hundred and twenty thousand dollars for the new school building, and bonds in the sum of five thousand dollars with which to purchase a new site. This proposition went before the voters of the district on the 8th day of July, 1919. Both propositions—that for \$120,000 for a new school building, and that for \$5,000 for a new site—carried.

The plaintiff brings his action against the board of education to enjoin it from further proceeding under the resolution and vote of the electors held, whereunder said board is about to issue and sell the bonds in the amounts as above described, buy a new site, and erect and equip a new school building, and asks that the board be enjoined from so doing, and that the auditor and the treasurer of Logan county be enjoined from placing upon the duplicate and from collecting the taxes or any tax thereby levied upon the property of plaintiff or those he represents, for the purpose of collecting, in addition to all other taxes, an amount sufficient to pay the interest on said bonds and to provide a sinking fund for their final redemption at maturity.

Plaintiff claims:

1. That his lands and the lands of these he represents have not been legally transferred from the rural school district to the De Graff village school district.
2. That the board of education was without jurisdiction or authority to order an emergency levy for \$120,000 of bonds.

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3. That there is no necessity for the erection of a new school building to provide for the needs and requirements of the pupils of the De Graff village school district.

As to the first ground set up—that is, that the lands of plaintiff and those he represents have not been legally transferred from the rural school district; the evidence shows that about three years ago there was a transfer of lands, including those of plaintiff, from Pleasant, Union and Miami townships, not before included in the De Graff village school district, to said village school district. The evidence shows that the plaintiff has since abided by the decision without complaint until now; that he has paid the taxes levied against his lands in the village school district, for about three years, without protest; that he has participated in the elections of the village school district, and by his acts and conduct has acquiesced in the transfer of property for such length of time that the court believes plaintiff is estopped from raising the question of the legality of the transfer at this late day.

The points argued as constituting the illegality of the transfer are, that notice was not published in a newspaper, and that funds were not apportioned between the districts according to the requirements of statute, and these are the only points touching the illegality of the transfer brought to the attention of the court. The court is satisfied from the evidence that publication was had and apportionment made of funds between the districts.

On the third point—that is, that the new building and the new site are not needed—this question is directed to the discretionary powers of the board.

The evidence shows that under an order issued by the industrial commission of Ohio, to put the present buildings in condition and equip them as required, would have cost the district something like eighty-five thousand to ninety thousand dollars; and with these repairs, the buildings would not be as up-to-date, nor as good and durable, as new buildings.

The court believes that it was within the discretion of the board of education to determine which should be done—that is, to repair or to build new; and by proper resolution the board of education determined to buy a new site and to erect new buildings and equip them according to law and the requirement of the industrial commission. The court is without authority to disturb the discretion lodged in the board of education. If there was abuse, in a gross form, of discretion a court of equity might intervene, but in this case there doesn't seem to be any abuse of discretion, and on that point there is no ground for injunction as prayed for against the board of education.

The second ground—that is, that the board is without jurisdiction or authority to order an emergency levy—presents a much more serious question.

Stating the proposition generally, without citing the sections of the statute in support, taxing boards are limited under the Smith one per cent. law to ten mills, other than an additional levy to take care of prior existing indebtedness, interest and bonds outstanding. Then, to exceed that amount of levy, it requires certain conditions to exist, and the exercise of certain authority to create what is known as an "emergency," whereby, upon a vote of the people of the taxing district, a greater levy may be made and collected from property holders and taxpayers of the taxing district.

It has been noted that the industrial commission, by its agents, prohibited the use of the school building and certain equipment of the De Graff village school district, some time during the spring or early summer of 1919.

The statute relied upon by the board is 7630-1, the first part of the section being as follows:

"If a school house is wholly or partly destroyed by fire or other casualty, or if the use of any school house for its intended purpose is prohibited by an order of the chief inspector of workshops and factories, and the board of education of the school district is without sufficient funds applicable to the purpose, with which to build or repair such school house or to construct

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a new school house for the proper accommodation of the school district, and it is not practicable to secure such funds under any of the six preceding sections because of the limits of taxation * * * on the approval of the electors in the manner provided * * * the board of education * * * may issue bonds for the amount required for such purpose."

This is known as the "emergency statute," for school building purposes, for exceeding prescribed limits in the amount of levy that can otherwise be made.

This section provides:

"If destroyed by fire or other casualty, or if the use of any school house, for its intended purpose, is prohibited by any order of the chief inspector of workshops and factories."

In other words, before the board of education is authorized to issue bonds in excess of the usual limit, one of these conditions must exist—either fire, other casualty, or its use prohibited by order of the chief inspector of workshops and factories.

The chief inspector can not order an election. That depends upon a resolution of the board of education. The board of education, by its own action, can not prohibit the use of a building for the purpose of an emergency levy. A joint action of the chief inspector of workshops and factories and the board of education is necessary to comply with the statute in creating an emergency justifying an excess levy.

It is contended by plaintiff that Section 7630-1 (which is the only section authorizing such an emergency levy) is repealed by implication, and that the resolution of the board of education is without authority in this case for the emergency levy proposed.

The date of the passage of the section just referred to, 7630-1, was April 18, 1913. O. L. 103, page 527. The same Legislature, on the 12th day of March, 1913, abolished the department of chief inspector of workshops and factories. (O. L. 103, page 103, Section 871-11.) The act was no doubt in full force and effect until the 1st day of September, 1913, when by

the former act the department of workshops and factories was abolished to take effect on that day.

Section 871-11 provides:

“On and after the first day of September, 1913, the following departments of the state of Ohio, to-wit: commissioner of labor statistics, chief inspector of mines, chief inspector of workshops and factories, chief examiner of steam engineers, board of boiler rules, and the state board of arbitration and conciliation, shall have no further legal existence, except that the heads of the said departments, and said boards, shall within ten days after the said date submit to the Governor their reports of their respective departments for the portion of the year 1913 during which they were in existence, and on and after the first day of September, 1913, the industrial commission of Ohio shall have all the powers and enter upon the performance of all the duties conferred by law upon the said departments.”

The title of this act is: “An act creating the industrial commission of Ohio, superseding the state liability board of awards, abolishing the departments of commissioner of labor statistics, chief inspector of mines, chief inspector of workshops and factories,” and continuing with a large number of other bureaus and departments, which, by this act, were abolished, and the industrial commission of Ohio created.

This act attempts to impose upon the industrial commission of Ohio all the duties, liabilities, authority, powers and privileges conferred and imposed by law upon these various boards, commissions, bureaus, etc., including the chief inspector of workshops and factories, on and after the first day of September, 1913, by reference only.

It was evidently the intention of the Legislature to substitute, throughout all the statutes of the Code, the words, “the Ohio industrial commission,” for “the commissioner of labor statistics,” “chief inspector of mines,” “chief inspector of workshops and factories,” “chief examiner of steam engineers,” “board of arbitration and conciliation,” and others. That is, that wherever the name of any one of these bureaus or departments or commissions stands in the statute, it is to be lifted

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out, and the words, "the industrial commission of Ohio" read into the statutes.

Section 871-24 (O. L. 103, p. 103) provides:

"All duties, liabilities, authority, powers and privileges conferred and imposed by law upon * * * the chief inspector of workshops and factories * * * are hereby imposed upon the industrial commission of Ohio and its deputies on and after the first day of September, 1913."

Section 7630-1, which authorizes the emergency levy under the conditions therein provided, was not specifically repealed by the enactment abolishing the department of chief inspector of workshops and factories. In fact it was enacted after the act abolishing the department of the chief inspector of workshops and factories had been passed but before it, Section 871-11, G. C., was to take effect, that is on the first day of September, 1913. It would have been an easy matter for the Legislature to have incorporated into this section that from and after September 1, 1913, the duties therein imposed upon the chief inspector of workshops and factories should devolve upon the industrial commission of Ohio. Then there could have been no question about the repealing of this statute.

Section 871-11 abolished the department of chief inspector of workshops and factories. And then after the first day of September—the act, however, providing ten days' additional time for the officers to make their reports and wind up the business of their departments—the industrial commission of Ohio was to come into being.

The question arises: Was the board of education of the De Graff village school district authorized to exceed the usual levy by an order coming from the industrial commission of Ohio, assuming that such an order was legally issued? If said commission made such an order and promulgated it to the board, did that authorize the board of education to call an election and to place upon the duplicate the excess levy under the emergency clause?

In other words—has this court the right to take out of Section 7630-1, G. C., the words, “the chief inspector of workshops and factories” and to write therein the words, “the industrial commission of Ohio”?

Article 2, Section 16 of the Constitution of Ohio, provides:

“No bill shall contain more than one subject, which shall be clearly expressed in the title, and no law shall be revived, or amended, unless the new act contains the entire act revived, or section or sections amended, and the section or sections so amended shall be repealed.”

When the Legislature abolished the department of chief inspector of workshops and factories, it affected this emergency school levy, Section 7630-1, for the reason that it took away the power that made the emergency levy possible.

The Legislature attempted to substitute a new board, by reference, but Section 7630-1 was not expressly repealed nor expressly amended. Then what rule shall apply? And how are the courts to be governed under a situation of this character? Repeals by implication are not favored. *Lehman v. McBride*, 15 O. S., page 573.

Before citing this authority the court should say that this particular provision of the Constitution above quoted, Article 2, Sec. 16, was not changed by the amendments that were enacted September 3, 1912.

Quoting from the opinion on page 603:

“The constitutional provision, to which it is said this act does not conform, was intended mainly to prevent improvident legislation, and with that view, as well as for the purpose of making all acts when amended, intelligible, without an examination of the statute as it stood prior to the amendment, it requires every section which is intended to supersede a former one, to be fully set out. No amendments are to be made by directing specific words or clauses to be stricken from or inserted in a section of a prior statute, which may be referred to, but the new act must contain the section as amended.”

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The Lehman case just referred to was decided in 1863. The Supreme Court pronounced the same rule in the case of *State ex rel v. O'Brien*, 96 O. S., 166. For a period of time from 1913 to 1915, personal property assessors were appointed, and on the 7th day of May, 1915, 106 O. L., 246, the General Assembly passed an act requiring assessors to be elected, and imposed duties by reference to the repealed law.

The sixth syllabus of that case is as follows:

“The provision of Section 16 of Article 2 of the Constitution of Ohio, providing that no law shall be revived or amended unless the new act contains the entire act revived or the section or sections amended, is mandatory. The inclusion, by reference, of the provisions of a repealed statute, is in violation of this provision of the Constitution of Ohio, and void.”

The seventh paragraph of the syllabus is:

“The statute, defining the duties, powers, liabilities and penalties imposed upon deputy assessors, being repealed, the provision of Section 17 of the act of the General Assembly of Ohio, passed May 7, 1915, 106 O. L., 246, that the elected assessor ‘shall perform all the duties, exercise all powers and be subject to all the liabilities and penalties devolved, conferred or imposed by law upon the deputy assessor so appointed,’ are unconstitutional and void.”

When the Legislature abolished the department of the chief inspector of workshops and factories, it repealed Section 7630-1 by implication, for there was no authority left in that statute that would give it vitality. The Legislature might have reenacted and revived the section, vitalizing the emergency act for an excess of levy over and above the prescribed amount, but the Legislature has not done so.

In the opinion, in the O'Brien case, page 177, *supra*, the court say:

“The repeal of the statute is the end of that statute. To all intents and purposes it is the same as if it had never existed. Reference in a legislative act to a repealed law, as supplementary

or explanatory, of the act, is an absurdity, prohibited by this provisions of the Constitution." "Any other course would lead to endless confusion and uncertainty and prevent an intelligent administration of the statutory law of this state. The fact that a statute is recently repealed or repealed by the same act it refers to, is no argument in favor of such loose legislation. If that can be done, then reference can be made to a statute repealed half a century ago, or the new section may remain unrepealed for the next half century. In either case, it would require that all the repealed statutes be carried into each edition of the General Code published; otherwise, there would be no means available to determine the scope, intent, and purpose of the act, which incorporates, by reference, a part of the provisions of the repealed law. This, of course, would be wholly impracticable, if not impossible."

The court has stated the well known rule that repeals by implication are never favored.

In *Goff v. Gates*, 87 O. S., page 142, the first paragraph of the syllabus reads:

"An act of the Legislature that fails to repeal, in terms, an existing statute on the same subject matter, must be held to repeal the former statute by implication, if the latter act is in direct conflict with the former, or if the subsequent act revises the whole subject matter of the former act and is evidently intended as a substitute for it."

The act establishing the industrial commission of Ohio abolished the department of chief inspector of workshops and factories. It thereby repealed by implication Section 7630-1, for this section is without force or vitality, with the department of chief inspector of workshops and factories abolished. Therefore that section was repealed by implication, as it became inoperative from and after September 1, 1913.

Donahue, judge, in the case of *Rabe v. Board of Education*, 88 O. S., page 403, lays down the law very plainly on the question of levying taxes and issuing bonds by boards of education. Quoting from the opinion on page 406:

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“The authority of this board of education to issue these bonds must be determined solely with reference to the law as it then existed and without reference to what the law had been in the past or might be in the future.”

Some of the sections that are included in the opinion do not apply, but the principle the court is announcing does apply, and the court desires to quote, omitting sections in most instances that the court uses, and applying the question to the sections that govern the case now under consideration, but not giving their numbers.

“These sections limit the rate of taxes that may be levied within any taxing district for all purposes, to ten mills on the dollar of the tax valuation of the taxable property of any county, township, city, village, school district or other taxing district for that year, and such levies in addition thereto for sinking fund and interest purposes as may be necessary to provide for any indebtedness heretofore incurred or any indebtedness that may hereafter be incurred by a vote of the people.”

“The Legislature, when it passed these sections of the General Code, limiting the rate of taxes that may be levied in any one taxing district, did not specifically repeal” (and here the court will supply, 7630-1) “but the effect of this latter legislation upon these former statutes can not be doubted.”

“It is the duty of the court to harmonize and reconcile laws where possible. It is also the settled law of this state that an act of the Legislature that fails to repeal, in terms, existing statutes on the same subject matter must be held to repeal the same by implication, if the latter law is in direct conflict therewith.”

In that case it was suggested, in a brief of counsel, that a certain section was not necessarily repealed, but that on the contrary the provisions of the later legislation, limiting the rate of tax that might be levied in any taxing district, should be read into a certain section instead of the specific sections named, and quoting from the opinion—

“In answer to this it is only necessary to suggest that a law can not be amended in this way.”

If Section 7630-1 is repealed by implication, which the court finds it to be in so far as it applies to or affects the "Chief Inspector of Workshops and Factories" or the "Industrial Commission of Ohio," then there is no statute authorizing such an emergency levy by reason of an order of the industrial commission of Ohio.

Section 16, Article 2 of the Constitution of Ohio, provides:

"No law shall be revived or amended unless the act contains the entire act revived or the section or sections amended, and the section or sections so amended shall be repealed."

Examination was made of the situation when the board of infirmity directors was abolished. But the act abolishing that board made no attempt to impose duties by reference. The board was abolished and the duties of the county commissioners therein defined. Section 2522, G. C., and following, 102 O. L., 433.

It therefore follows that Section 7630-1 being repealed by implication by the passage of 871-11 and 24, it could not be revived, re-enacted, or amended by any method in direct conflict with the positive prohibition of the Constitution; and because of the fact that the Legislature has never seen fit to take out of the statute the words, "the chief inspector of workshops and factories," and to write into it, "the industrial commission of Ohio," Section 7630-1 has not been the law since September 1, 1913, and is not now the law of Ohio.

The court finds further that the record certified from the industrial commission is of itself insufficient to warrant the plaintiff in the action taken, as that commission was named in Section 7630-1, G. C., for the reason that the record fails to comply with Section 871-9, wherein it is provided that—

"The commission shall be in continuous session and open for the transaction of business during all business hours of each and every day, excepting Sundays and legal holidays. The sessions shall be open to the public and the sessions of the commission shall stand and be adjourned without further notice thereof on its record. All of the proceedings of the commission shall

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be shown on its record, which shall be a public record, and all voting shall be had by calling each member's name by the secretary, and each member's vote shall be recorded on the proceedings as cast."

The certificates filed do not show that the members' votes were recorded on any stated proceedings. There is no record that the matter of the De Graff village school district or the matter of the board of education of the De Graff village school district was even submitted to the commission and voted upon by the members thereof. The certified copies of the record simply say, under the three separate dates of April 24, 1919, July 31, 1919, and August 11, 1919, the commission approved the orders issued by the department of inspection, division of W. F. and P. B., followed by the vote. What orders were approved? Did the commission vote on the De Graff school house question? If the members did vote, there is no record shown by the certified copy. The certificate shows that the commission voted to approve orders of an inspector issued on a date; voted approval of orders, in the plural, on certain dates. Did the board vote on all the orders issued for a day, without reference to them separately? The only possible connection shown here is by dates, no substance, merely dates. "The members' votes shall be recorded in the proceedings." "The proceedings" are not even named in the record.

Section 871-5, G. C., part of the same act, further provides:

"Every order made by a member thereof, or by one of its duly authorized deputies, when approved and confirmed by a majority of the members and so shown on its record of proceedings shall be decreed to be the order of said commission."

But there are no "proceedings" shown by the certificates filed, nor is it shown that any "proceedings" were had with reference to the De Graff school building.

The Industrial Commission, when it attempts to exercise special jurisdiction in so important a matter as an emergency levy of taxation, must act in the manner pointed out in the statute.

Bloom v. Xenia, 32 O. S., 466; *Campbell v. Campbell*, 49 O. S., 463.

A separate vote and a separate record on each "proceeding" should be had and recorded.

Were there no other question in this case than the sufficiency of the record, the court would be warranted in holding that the board should be enjoined, for the reason that there had been no finding by the industrial commission authorizing the defendant board to proceed to make the emergency levy.

The further finding is that that part of Section 871-11, G. C., providing for the transfer of powers and duties from the chief inspector of workshops and factories to the industrial commission, by reference, is unconstitutional and void; that Section 871-24, G. C., wherein and so far as said section or part of said section attempts to transfer from the chief inspector of workshops and factories and to impose the duties, liabilities, authority, powers and privileges thereof upon the industrial commission by reference, is unconstitutional and void; that Section 7630-1, G. C., was from and after September 1, 1913, repealed by implication; that the same has not been revived or re-enacted, and is not now the law.

The court is aware of the significance of this finding and it is not without much anxiety that this decision is pronounced. The people of the district have voted for and are willing to pay the excess rate of taxation to procure such school accommodations as the majority desire, and it is regretted that the laws are not sufficient to permit the accomplishment of the public will.

In view of the recent findings of the Supreme Court on the question before the court now—that is, that Sec. 7630-1 is repealed by implication, and has not been revived—and the court being without power to revive it, that duty belonging to the Legislature, the finding of the court is that the temporary restraining order be made permanent.

Defendant to pay the costs.

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Kearney v. Cincinnati.

ORDINANCES COVERING STATUTORY OFFENSES.

Common Pleas Court of Hamilton County.

RICHARD KEARNEY V. THE CITY OF CINCINNATI.

Decided, December, 1919.

Municipal Corporations—Validity of Ordinance Covering Assault and Battery—Attack on Emergency Feature.

1. A charter city has the power to define and make punishable the offense of assault and battery.
2. The emergency feature of an ordinance can not be attacked after the referendum period has expired.

A Lee Beaty, for plaintiff in error.*Saul Zielonka*, City Solicitor, and *Chauncey D. Pichel*, Assistant Prosecuting Attorney, for defendant in error.

COSGRAVE, J.

Heard on error to the municipal court of Cincinnati.

Plaintiff in error was prosecuted in the court below upon two affidavits, each charging the commission of an assault and battery. These affidavits were based upon a city ordinance, defining and making punishable the offense of assault and battery, employing the identical words of the statute. This provision is Section 849 of Ordinance No. 88-1919, passed and approved April 15, 1919. This was an emergency measure, it being declared that it should go into immediate effect because it was necessary for the immediate preservation of the public safety.

Cincinnati being a charter city and enjoying the benefits of home rule under the provisions of Section 3 of Article XVIII of the Constitution of the state of Ohio, there is no doubt that it has the power to define and make punishable the offense of assault and battery, notwithstanding the fact that such offense has already been made punishable by statute. The Legislature has not exclusive police power in this particular. *Welch v. Cleve-*

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Greenbury v. Cincinnati and State v.
at page 286.

el for plaintiff in error that the ordi-
fidavits are predicated is immaterial.
real emergency could not have existed
of said ordinance, as there was a
offense. The ordinance is not in the
t advised as to whether or not except
el) it was an emergency measure. The
ow consider the question of the emer-
dinance, or whether or not the conten-
aintiff in error is well taken.

the offenses with which the plaintiff
e committed on the 23rd day of August
August, 1919, respectively.—several
ce had been passed and become effective
e statutory time within which a referen-
nvoked had long passed. There is no
t plaintiff in error that the ordinance did
votes to make it an emergency measure.
led in the Conservancy District Case, 92
221 the court says:

that this act had a majority vote in both
empt was made to invoke the referendum
stitution thereon, then at the end of the
same became a valid law as enacted. The
referendum might be invoked, as provided
had elapsed. The right to have the same
for judgment had been lost and it was too
back the emergency character of that act
thereon, or otherwise."

the municipal court of Cincinnati will there-

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Park v. Hotel, etc., Employees.

**INTERFERENCE WITH EMPLOYER'S BUSINESS BY STRIKERS
ENJOINED.**

Common Pleas Court of Cuyahoga County.

LOUIS PARK, ET AL, v. LOCALS NOS. 106, 107, 108 AND 167 OF THE
HOTEL AND RESTAURANT EMPLOYEES INTERNATIONAL
ALLIANCE, ETC., ET AL.

Decided, June 12, 1919.

Strikes and Lockouts—What Constitutes Lawful Picketing—Interference With Free Ingress and Egress from Employer's Place of Business May be Enjoined—Relation of Employer and Employees Necessary to Render a Strike Legal—Definition of Trade Dispute—Illegal Conspiracies—Boycott to Compel Ousting a Partner from the Business May Not be Maintained—Declaration of a Strike by Local Unions Without Authority of Governing Body.

1. A strike in a labor sense is a stoppage or cessation of work by common agreement on the part of any number of workingmen employed by a common employer, for the purpose of obtaining or resisting a change in the conditions of employment. In the prosecution or carrying out of such strike, the workingmen may legally place pickets or patrols within a reasonable distance of the employer's place of business, for the purpose of observation and of obtaining information to be conveyed to persons honestly seeking and willing to receive it, and for the purpose of using orderly and peaceful persuasion with those, willing to listen, to abstain from working for the employer against whom the strike has been declared during the continuance of such strike.
2. If such pickets, however, by their conduct and number, prevent peaceful and free ingress and egress to and from such employer's place of business, and by intimidation, violence and coercion of any kind, direct or indirect, prevent persons who so desire from entering or remaining in the service of such employer, the object in view being to prevent freedom of will and action on the part of persons seeking employment or remaining in the employment of the employer, such conduct will be held to be an unlawful conspiracy and will be enjoined.

3. There can be no legal strike in a labor sense unless the relation of employer and employee exists, or did exist between those doing the picketing or causing it to be done, and the person whose place of business is thus picketed, the legal right to lawfully picket a shop, store or factory being based upon a trade dispute between the workers and their employer.
4. A trade dispute can only exist or arise where there is a stoppage of work by employees, or lockout by the employer, and there is an intention and reasonable expectation upon the part of both employees and employer to resume the relation of employer and employee upon the satisfaction of certain specified conditions prescribed or agreed to by one or both of the parties to the dispute.
5. When the members of a trades union or a labor organization agree by resolution or otherwise not to deal with or hold social, commercial or business relations with a corporation or other person engaged in business of any kind, with whom it never had any trade dispute or relations of employment, such act is a boycott and not a strike; that is, it is a refusal and incitement to refusal to have such business relations with any one on whom it is desired to exercise or bring pressure for the attainment of some definite purpose, and so long as the union or the organization confines the boycott to its own members, the right to so refuse to trade with or have business relations with such person or corporation is legal and unassailable, as any man has the right to refuse business relations with another, and with his reasons for so doing, the public or third persons are not concerned.
6. If, however, the union or labor or other organization influences others not members of the organization or combination and the public generally not to trade with or have business relations with the persons against whom the boycott is declared, and upon whom it is desired to bring pressure for any purpose, then the boycott becomes an illegal conspiracy and will be enjoined.
7. Placing pickets and patrols in front of the entrance to the place of business of a corporation or person, so as to prevent a free and peaceful entrance or exit from such place by those of the public desiring to enter or leave such place, the organization so placing such pickets and directing their activities, having no trade dispute with the owner of such place, is wholly unjustifiable and will be enjoined.
8. Where a number of men are engaged as partners in conducting and managing a business, each partner has the right, as provided by agreement between them, to take part in the conduct and management of the business, and partners so taking part in the conduct

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and management of such place are not to be regarded as servants or mere employees of the concern, and a general boycott in which the public is asked to participate, inaugurated for the purpose of bringing pressure upon the management of such place to discharge any of its partners and employ outsiders to do their work, is unlawful and will be enjoined.

9. A governing body of an international labor union from which local unions or branches derive their sole and only authority, having provided in its constitution that "No local union shall under any circumstances be permitted to declare a boycott," the declaring of a boycott by a local or number of locals of or deriving authority from such governing body, is unlawful as an exercise of power upon the part of such locals, and they are not entitled to any consideration in a court of equity concerning the mode or manner of prosecuting such boycott, and must be regarded as an irresponsible body or combination outside of the labor organization in which they claim membership, and are not acting within the scope of any authority granted by their own fundamental laws.

Gage, Day, Wilkin & Marvin and Calfee, Fogg & White, for plaintiffs.

J. A. Cline, contra.

FORAN, J.

This is an action by Louis Park and 22 other Chinamen who claim to be the owners and proprietors of a restaurant located at 304 Superior avenue, in the city of Cleveland, Ohio, and known as the Peacock Inn, against Locals Nos. 106, 107, 108 and 167 of the Hotel and Restaurant Employees International Alliance, and others sued with them, as the caption indicates. Twelve of the plaintiffs claim that they are natural born citizens of the United States and state of Ohio, and the others are natives of China but claim that by treaty stipulations between China and the United States they have a right to maintain this action.

Their claim is that the defendant trades unions are labor organizations and consist of a large number of persons whose names and residences are unknown, and that all the defendants are engaged as conspirators in a common unlawful conspiracy and boycott against the plaintiffs.

In brief, the claim of the plaintiffs is that they are conducting a Chinese restaurant, and that all of the plaintiffs are partners, are joint owners and are jointly interested in the Peacock Inn; that they employ no waiters except the members of the copartnership, who are named herein as plaintiffs; that prior to the opening of said Peacock Inn, defendants demanded that no person be permitted by the plaintiffs to wait on patrons of said restaurant or to render service as waiters therein except persons who are members of the labor unions or organization to which the defendants belong; that they refused to accede to this request, and that thereupon the defendants inaugurated a boycott against the said restaurant and placed pickets in front of the door leading thereto, the restaurant being located upon the second floor of the building, and that the pickets of defendants continuously, especially during the times that meals are being served, walk up and down in front of said door leading to said restaurant, unlawfully blocking the entrance thereto and calling upon patrons and others who are passing by said door, that no patriotic citizen should patronize said restaurant because it is unfair to union labor; that the defendants, through said pickets and otherwise, have wilfully, maliciously and falsely represented to the public and to the patrons and others of the plaintiffs, that the plaintiffs are unfair to union labor and have refused to employ returning soldiers of the United States, or, in other words, that they have instituted an illegal and unlawful boycott against plaintiffs and are threatening to do the plaintiffs irreparable injury; that they have no adequate remedy at law; and further, that the defendants refused to admit the plaintiffs to their union; that the plaintiffs never had any contractual or other trade relation with the defendants or any of them; that there is no trade dispute between the plaintiffs and defendants; that all of the plaintiffs are willing to work in said restaurant and that none of them have gone on strike or are engaged in a strike, and that the defendants are passing out cards to the public and especially to persons who are desirous of visiting and patronizing said restaurant, and that the following is a copy of said card:

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300 STARS

On Our Service Flag.

Our Boys Are Coming Home,

THEY NEED WORK!

Don't Patronize The Peacock Inn

The Golden Pheasant

They Refuse to Employ Them.

They Are Unfair to Organized Labor.

Endorsed by the

Local Joint Board of the

Cleveland Fed. of Labor

H. & R. E. I. A.

and B. I. L. of A.

(Union Label.)

This card is printed in three colors, the top being red, the center white, and the lower portion blue.

And further, in an amendment to the petition, plaintiffs claim that the defendants have continuously, since the opening of the Peacock Inn, maliciously and for the purpose of destroying the business of the plaintiffs, threatened, intimidated and coerced prospective patrons of the plaintiffs and the public generally, for the purpose of causing them to refrain from patronizing the plaintiffs' restaurant, and to discriminate against the plaintiffs in the operation of their restaurant, on the ground that they are Chinamen and members of the yellow race, and that Americans should not patronize a Chinese restaurant, but should confine their patronage and support to restaurants operated by Americans or by white persons.

To this petition the defendants have filed a joint answer, in which, after certain admissions, they deny all the allegations in the petition and the amendment to the petition, for the reason that said statements are untrue or that the same are beyond the knowledge of these answering defendants. They further say that the Peacock Inn restaurant is a partnership operated under a fictitious name, and that the defendants have not complied with the laws of the State of Ohio with reference to partnerships. Further, they aver that the defendants belong to a voluntary organization and are not proper parties to the action. Further, they aver that Local Unions 106, 107, 108 and 167 are voluntary organizations, are not proper par-

ties to said action and should be dismissed therefrom; that the defendants are members of a labor union, the purpose of which is to

“lift the mental, moral and social condition of the waiters of Cleveland or vicinity in an endeavor to obtain proper conditions for their labor, better hours and better wages, and at the same time insure to their employers more perfect work and faithful service, and the establishment of general confidence between employers and employees.”

The defendants further aver that the plaintiffs employ persons of Chinese extraction as waiters and cooks and that said persons are in competition with the members of the local unions represented by the defendants, and that said competition is unfair, in that the employees of the Peacock Inn work a number of hours per week which are unhealthful and tend to promote bodily disease and bodily weakness; that because of the ability or willingness of the Chinese employed by the plaintiffs to work under such conditions, the employees of the plaintiffs have entered into unfair competition with American workmen in the same line of business, and that if this competition continues, the defendants and the members of the local unions to which they belong will be unable to maintain their standard of living, but will be forced out of employment; that in order to protect themselves and overcome this unfair competition, the defendants aver that it is necessary and desirable that the public of the City of Cleveland and elsewhere should be informed of the unfair competition which these defendants and their associates are required to meet; that they have a just controversy and dispute with the plaintiffs and their employees concerning conditions and terms of employment, which they have a right to settle on fair conditions, and for that purpose they believe they have a right to inform the public of the conditions under which their Chinese competitors live and work; and further, that they fear, and have good reason to fear, that if the Chinese competition which is offered by the plaintiffs can not be met by the defendants and other American workmen engaged as waiters,

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the members of the various labor unions affiliated with the defendant unions will be forced out of employment as waiters.

Defendants further aver that there is no malice, ill-will or hatred in their motives in doing what they are doing, but that they are engaged in a struggle for existence against unfair competition. Defendants admit they maintain pickets in front of said Peacock Inn, but deny that these pickets are acting contrary to law or are doing anything which they are not justified in doing under the laws of the United States.

The pleadings are quite lengthy and the summary given is but a bare outline of their contents. The facts as developed by the evidence show that the plaintiffs are Chinamen, either born in the United States or in China, that they are owners and proprietors of this Peacock Inn as partners, and are engaged in conducting and carrying on a restaurant business and catering to the public generally; that the defendants never had any of their members or any of the members of their unions employed in this restaurant; that there never was a strike in the restaurant by any of the employees thereof, and that the sole purpose of the defendants is to compel the plaintiffs to employ union waiters or drive the plaintiffs out of business.

The court has serious doubts from the testimony whether the defendants really desire to become waiters in this restaurant, and seriously doubts the good faith of defendants in carrying on and conducting the boycott which it is admitted is being carried on and conducted against the Peacock Inn. The local unions named as defendants are constituent members of what is called the Hotel and Restaurant Employees International Alliance and Bartenders International League of America. The use of the word "International," however, appears to be unjustifiable, because by Section 15 of the constitution of this organization, it is provided that no persons can become members who are not citizens by birth or naturalization, except it is provided that an applicant who has declared his intention of becoming a citizen may become a member, but must perfect his naturalization as soon as he is entitled thereto. and that failure to perfect citizenship, is subject to cancellation of

membership; and it is provided in the constitution that colored men may form local unions, but may not belong to the unions consisting of white men. In other words, while the colored brother may belong to the same church, he is not permitted to worship in the same pew. It is admitted that Chinamen can not belong to any local of defendants' international union, and it will be therefore seen that the efforts of the defendants, as disclosed by the evidence, are not for the purpose of unionizing the Peacock Inn, but for the ostensible purpose of compelling the management to discharge Chinese waiters and employ white waiters, and in default of so doing, compel the restaurant to cease doing business.

It may be doubtful whether all of the plaintiffs are partners, their claim being that each has put into the common fund from \$500 to \$2,500. They have made affidavit to this effect, and there are no counter-affidavits filed by the defendants denying this fact. An effort was made to show that they were not partners, for the reason that many of them at the time the restaurant was organized had no money in bank or on deposit in any bank; but the court is unable to say or to hold that the claim of the plaintiffs that they are partners is untrue. It is matter of common observation that foreigners generally do not deposit their funds or money or surplus money in banks. Frequent references in the press to the loss of money by foreigners who keep their funds about them or in their homes, by loss, thefts and otherwise, is well known. If the plaintiffs are in fact partners, it is indeed difficult to see or understand how a boycott including the public can be legally maintained against them. Under modern social conditions, the law of competition in business controls business relations as immutably as the law of gravitation controls matter. If a Chinaman can furnish better food at less cost than a white man, he will be patronized, and I know of no law that will compel or force any patron to pay a higher price for inferior food merely because it is prepared and served by a white man. While I may have some doubts or may have a suspicion as to the fact that the plaintiffs are all partners, yet the evidence seems to indicate that

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they are, and if this is true, there is no principle of law that has come under my observation that will permit a combination of men to request the public to boycott a store, restaurant or factory merely because it has a number of partners, all of whom are engaged as workers in the business.

During the argument, much was said about the dignity and the rights of labor, with all of which the court is in hearty accord. Labor may be said to be the effort of human beings voluntarily exerted to attain a desired object or purpose. Labor does not and can not create matter, but by transmutation, transportation and transformation it changes the place and shape of matter from one manifestation or form into another. It is the most essential element of production, for without it there can be no production, and hence labor is essentially necessary to the progress, stability and well-being of society. A fundamental law of labor is that it follows the line of least resistance, for man has ever sought and ever will seek to attain with the minimum of exertion the maximum of results. It is universally admitted that two men working together in certain lines of effort can produce a great deal more than both working separately, and therefore the efficiency of labor is vastly increased by combining the efforts of a great number of men, as well as by labor-saving devices and natural agents, such as water, steam and electric power. That labor is a burden is an indisputable fact, if performed for the sole purpose of obtaining a livelihood, without regard to its ethical significance. When a man enjoys his work and derives pleasure from the shape, form and beauty of the thing he is creating, the exertion ceases to be labor. A beautiful house exists in the mind of the architect or carpenter before he draws his plans or raises a hammer or grasps a saw, and as the carpenter proceeds to build for the love of creating, the exertion becomes pleasurable and not laborious. It therefore must be true that the physical effects of labor on a human being can be and are vastly diminished by the intellectual development and moral elevation of the laborer. The labor union that ignores this fact and devotes all its energies, through combination, to the

development of material, coercive force and power to accomplish results however desirable, misses the vital principle of organization. If mind is the supreme law of human destiny, then to organized mind must be traced the progressive development of the human race. If labor is to progressively improve social conditions and attain higher idealities and grander realizations of human perfection, it must not forget that the organization of mind is an absolutely essential requisite to that end. To the man who takes no interest in his work except in so far as it furnishes him the means of subsistence, be he a professional, agricultural or industrial worker, the day seems interminably long and labor an intolerable, slavish burden. Such men become clock watchers, never progress, never rise into the realm of achievement, and eventually become scrap heap failures on the great highway of civilization, talking loudly of the rights of labor, whose blessings, benefits and beauties they ignore and neglect. The legal right of labor to organize, combine and strike against unjust conditions of employment is so universally recognized that the argument of counsel upon that phase of the controversy was wholly gratuitous, at least superfluous and unnecessary. The right is fundamental, for property and capital owe their existence not merely to the intelligence and effort of those who control them, but almost wholly to the labor of men in co-operation with the influence, power and forces of society. Property and capital are, in great measure, a social and collective, rather than an individual or personal fact. The greatest genius for industrial organization that ever lived could not create capital in a desert or wilderness where labor and society were unknown; hence labor and society, being largely, almost wholly the creators of wealth and capital, separate and apart from its owners, have a qualified and moral interest in it, and the right to protect those who create it and guarantee to them an equitable share of the results of their labor.

For generations the Congress of the United States, through protective legislation, has guaranteed to capital a minimum of profit. If the theory or doctrine is sound, no man can justly

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say that labor should not be guaranteed a minimum wage. As the law protects the genius of the inventor and the author, it can not consistently withhold from the worker the right to protect himself by all peaceful and lawful means, if society neglects or refuses to perform the full measure of its duty in this respect.

Again, a workman may have a direct implied contractual interest in the business of the man employing him; he may have moved with his family from a far distant state to the place where he is rendering service, at the invitation of the employer, and built a home adjacent to his factory. He has with the employer an implied contract of employment so long as he renders efficient service and conforms to the rules of the establishment. While in a certain sense this contract may be terminated at the will of either party, yet by common usage, based upon reason and sound public policy, the employer may not exercise his right to terminate the contract capriciously, arbitrarily or from motives purely sinister. For instance, in many railroads, efficient, sober and courteous employees are never discharged, and when incapacitated by age or infirmity, are retired upon a pension graduated by length of service and rate of wage. The fact that they have an interest in the property they helped to create is recognized by some corporations, even though society has failed to perform an obvious duty.

The right of the expectation of continuous employment during efficient and good behavior is no longer a claim based upon charity or the grace or pleasure of the employer, but a right based upon justice and the welfare of society. This right, however, exists independently of labor unions; it is the right of all workmen, whether organized or not. Organized workmen believe, and may be justified in the belief, that the condition of labor is advanced and improved by unionization, but they have no right, by coercive force and intimidation, to thrust their views upon those who honestly differ with them. If this claim of the unionists is admitted, then free will and liberty of thought and action are destroyed. No man will claim that the members of one political party may, by force and coercion and in-

timidation, compel the members of another political party to vote their ticket; nor will it be contended that the members of one religious denomination may coerce and force all others to unite with them and believe as they do, even upon the theory that the force and intimidation are applied for the sole purpose of saving the immortal souls of the unbelievers.

The right of legitimate and lawful propaganda is of course recognized. Propaganda in support of a principle based upon truth and honesty is a moral force of tremendous effect, far more potent in its consequences than coercion and intimidation. It is an appeal to reason and not an invasion of rights a man may honestly believe he is justified in preserving by all proper means in his power. Every creed, whether religious, social, industrial or political, must be judged and measured by the character of men and women it produces. If the tendency of unionism is to produce better citizens and more efficient, competent workmen, men who regard labor as "its own end," ethically considered, then unionism will succeed and prevail, no matter what forces or combinations may be arrayed against it; but if it seeks to destroy initiative, incentive and individualism, and reduce all its members to the dead level of mediocrity, it will fail ignominiously.

The individual man can not develop or progress to a higher plane in a barren waste or in a wilderness; he can only develop to higher idealities in the social state. He brings to society only his labor and his undeveloped faculties. All that he ultimately becomes, he owes to society. If man would be happy, he must remember that labor is a duty as well as a right. To take labor out of the world, to forget that all progress is the result of overcoming difficulties, would place man back in the mists and shadows from which he emerged in prehistoric times. It may perhaps be impossible to wholly eliminate poverty, suffering and misery—they exist in the best governed states, and always will, as it is impossible to give to every human being the same ambition, desire and initiative. The effects of heredity, prenatal and congenital conditions can not be foreseen, nor wholly remedied by environment. It is vain to dream of an

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Utopian age of effortless affluence and ease. That evils existing in society can be minimized by the steady progress of the race toward higher conditions is incontestable, and it should be our aim to aid this progress to the extent which experience and wisdom will permit. At present there are two classes: Those who have, and those who have not. If those who have not were to appropriate all the wealth of those who have, in a very limited period the two classes would again appear, for the wasteful and improvident would lose to those who cultivate habits of thrift and economy, or to those of natural or acquired selfish, shrewd, unscrupulous propensities.

Labor creates property, which in turn produces and multiplies itself. Savings come from wages and property in the open market is ever at the beck and call of savings. Some men dream of an ideal state which will "take charge of man from the cradle to the grave, caring on the way for all his necessities, from education to wages, opening in a word to all human beings according to age, the cradle, the asylum, the school, the workshop and the hospital." In this ideal state, ambition, initiative and incentive are destroyed and man becomes a mere automaton, and the very law of existence, which is the law of labor, has no longer any appeal.

It is the duty of society to improve and lift the condition and status of all its members, and in proportion as it does this, it strengthens and stabilizes the state, but when a few men seek to usurp this collective duty of the state as their individual right, a conflict of authority necessarily arises which tends to the worst possible species of tyranny, the tyranny of an irresponsible minority, destructive of representative government.

It is to be regretted that society has so far evolved no more efficient or logical mode of settling labor and trade disputes than that archaic, clumsy expedient and disruptive force known as the strike. It would seem that legislation not destructive of individualism or bordering on state socialism could be devised that would bring about a just and equitable distribution of the wealth created by labor and capital. It would further seem that politicians are controlled by capitalists and that labor, organized

and unorganized, is still shackled and dominated by political bias and prejudice. In a government like ours, where universal suffrage prevails, or soon will, all wrongs and grievances can be redressed by the *vox populi*, operating through society, whose highest duty is to give value to the individual without resorting to forces which lead to anarchy and chaos. The workers have a peaceful legal remedy provided by the Constitution and laws of the land, which, for some reason, they seem unable or reluctant to use and apply. The primary object of society being to give value to the individual, the state not only has the right, but it is its duty, by appropriate legislation, to provide for an honest and equitable distribution of that which is produced by the combined efforts of labor and capital. The power of the state in this behalf is only limited by the line of demarcation in the twilight zone of the circle of rights and duties. In other words, every man in society has rights which are guaranteed and must be respected. Every right, however, is limited by a duty, and the circle of rights is no broader than the circle of duties. Every man has a right, by his labor, to build or provide a home for himself and family, but he has no right to burn down the house of his neighbor or appropriate it simply because he was too shiftless to provide one of his own.

In *Railroad v. Keary*, 3 O. S., 202, that able and distinguished jurist, Judge Ranney, said in the syllabus:

“It is a settled maxim of the common law, founded upon the highest obligations of social duty, that every one shall so use his own,, and so prosecute his lawful business, as not, by his negligence or want of care, to injure others.”

And in the opinion, page 206, he says:

“Whatever is not prohibited, may be lawfully done. Whatever a man possesses, that the law recognizes as property, may be used for his benefit, in a lawful manner. What it allows to one, it allows to all, and secures to all the enjoyment. Hence, in prosecuting his own lawful business, and in the use of his own property, he must submit to the great social necessity of so using his own as not to injure others. While they are his legal right, *this* is his legal duty. They go hand in hand, and

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the law scrupulously respects the one, and rigorously enforces the other. It treats man as a rational and intellectual being, capable of understanding his duties to his fellow-men, and requires of him, in his intercourse with them, to exercise a constant regard for their rights."

Bishop on Non-Contract Law, Section 10, *et seq.*, says:

"Every person is entitled to live as long as, without feeding on his fellows or otherwise injuring them, he can. This is a self-evident truth. Hence, as no man can live by simply sitting down and breathing, everyone has a right to be constantly active. And as necessarily each one is moved by impulses from his own mind, not anothers, all are permitted to obey, because they must, their several wills."

Again, in Section 14, he says we have an illustration of universal principles,—

"That, as individuals and their property exist not only separately but also in a combined whole, there is a use legitimate, therefore permissible, for every man's exertions and estate; but it is unlawful for one to employ either in a way to injure those parts of the combined whole which belong to others. In complications of affairs the applications of this doctrine sometimes become difficult, but the doctrine itself is, if not absolutely, yet practically self-evident."

Again he says, in Section 12:

"Each individual has the natural right to the fruits of his own labor. Therefore if one has not occasion to use all today when he is well, he may lay up the surplus for tomorrow, when he may be sick."

This principle we see illustrated in animal life. The squirrel lays in a supply of nuts or grain in the fall of the year to support life during the winter months. Now, suppose one squirrel, stronger and more vicious and savage than the others, undertakes to accumulate more than is necessary for his own subsistence, to the detriment of the other squirrels. The other squirrels have a right to resist this encroachment upon their rights, but if they go so far as to kill the greedy squirrel and

appropriate *all* his hoard, then they sink to a lower level of animal savagery. The same is true with respect to men.

A neolithic superman, far in advance of his times, fabricates improved appliances and implements for killing and securing food. In bartering with the members of his tribe or exchanging his improved appliances for game and food, his demands are exorbitant and excessive. The tribe, instead of regulating the barter and exchange, kills the greedy, skillful worker and appropriates all his fabricated implements. These are soon worn out and lost and as there is no other source of supply, the tribe learns too late that it made a fatal mistake.

It is idiotic to destroy property. It is wise to distribute or provide for its distribution to those who created it, in proportion to the efforts, skill, forces and means used in its production.

The doctrine as laid down by the learned and able writers and jurists above quoted is more concretely expressed by *Eugene Paignon*, who says:

“Society having an object, each one of its members should divest himself of the rights the personal and independent exercise of which would hinder society from attaining this object. He should accept all the duties which society imposes upon him for the attainment of this object, for there would be no society, properly speaking, *where there was no controlling power to compel co-operation to attain the final object of society.*”

The final object of society, as I have said, is to enhance and give value to the individual. This can not be accomplished unless the individual is given the right of security and freedom of will and action, not inconsistent with the rights of others. This fundamental principle may be expressed in the formula: The rights and liberties of one citizen end where the rights and liberties of another begin. Society originated in the conscience, needs and necessities of man; it is based upon right and duty, and man can not destroy it without destroying himself. The moment we permit one man to claim as a right that which is the duty and function of society, we can not limit the grant of right, for whatever one man may lawfully do, so may another, and hence we would soon have as many different proposed remedies

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for the ills of society as there are different varieties of mind. The result would of course be chaos and anarchy.

The blind Samson may pull down the temple, but if he does he will perish in the ruins. If the iniquities of the Philistines can be controlled by the strong arm of the law, why not use it, and if the arm of the law is not strong or long enough, why not lengthen and strengthen it when this can be easily done? Why not peace which is constructive, rather than war which is disruptive and destructive?

That capitalists in many instances wax and fatten at the expense of labor is universally true, but the workers outnumber the social parasites ten to one and can, by political unification or affiliation with the party that responds to its just demands, secure all the protection guaranteed by the Constitution. Forty-six years ago I advocated suffrage for women in the Ohio Constitutional Convention of 1873, because I believed then, and do now, that woman suffrage will enhance the power of the worker at the ballot box, but I am reluctantly forced to admit that in the ranks of labor are to be found some of the most pronounced opponents of this supreme measure of justice; not only that, but there is under full swing a determined effort by many labor unionists to deprive women of the right to labor. These facts need no comment.

Having in this general way outlined a few of the fundamental principles underlying social conditions, the question before the court will be considered in the light of, and from the viewpoint of these principles which are as eternal as truth and conscience.

What is a strike? The *Century Dictionary* defines a strike as follows:

“To press a claim or demand by coercive or threatened action of some kind; in common usage, to quit work along with others, in order to compel an employer to accede to some demand.”

Martin, in “*The Modern Law of Labor Unions*,” Section 25, gives many definitions of a strike, taken from lexicographers and judicial opinions, which he thinks unsatisfactory, and then gives this definition:

“A strike may be defined as a simultaneous cessation of work by workmen acting in combination to compel their common employer to accede to demands made on him by such combination.”

The following are definitions of a strike:

“To cease from work in order to extort higher wages as workers.” *Worcester's Dictionary*.

“The simultaneous cessation of work on the part of workmen.” *Hand, J. in Farrer v. Close*, L. R. 4 W. B., 612.

“To cease work in a body by prearrangement until a grievance is redressed.” *National Protective Assn. v. Cummings*, 170 N. Y., 315.

“The cessation of work by employes in an effort to get better terms of employment.” *Iron Moulders Union v. Allis-Chalmers Co.*, 166 Fed., 45.

These definitions, however, lose sight of the fact that a strike may be declared to *resist* a demand made by an employer or a condition of employment the employer seeks to enforce. The best definition that has come under my observation is the following, found in the *Encyclopedia Britannica*:

“A strike in the labor sense is a stoppage of work by common agreement on the part of a body of workingmen for the purpose of obtaining or resisting a change in the conditions of employment.”

It will be noticed in all these definitions, and in every definition of a strike that can be obtained, that a strike only results where there is the relation of employer and employe; that is, a strike can only be said to exist where there is a trade dispute between the employer and his workmen. This relation is the essential basis of the legal right to maintain and enforce a strike. A strike can not be said to exist where the relation of employer and employes did not exist. Suppose, for instance, a labor union says to a man who employes only non-union labor, “You discharge your men or compel them to join our union,” and if he refuses, they proceed to picket his factory, store or place of business and resort to the usual coercive tactics accompanying such picketing. The action of the union is not a strike, but is a

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boycott. Neither the union or its members had any trade or other relations with the man, no dispute with him, except a dispute created by themselves. The employer could well say to the union, "I never had any relations with you, I have no dispute with you. Your demand is an impertinence and an invasion of my rights and the rights of my men, who are satisfied with their conditions of employment, which conditions are fully as good, if not better than, the conditions of employment enjoyed by you." He might go even farther and say that his men were governed by the merit system, that the most efficient were guaranteed advancement in the ratio of efficiency, while the union men demanded the same wage for the least efficient as well as for the most efficient, and thus destroyed all incentive to and desire for advancement. Under such circumstances, why should this employer be deprived of the right to run and manage his business upon theories he deemed best for himself and his men, and why should the men be unionized against their will? Did not the right of the union end where the rights of this employer and his men or his workers began? Argument would be wasted upon men who denied the soundness of this proposition. Conduct of this kind would be license to injure another, rather than the right to better the condition of the one asserting the license. It would be an injury to society itself.

Society is an integer whose unity is menaced by the destruction of its fractional parts. Wrongs must be redressed and eliminated, but only by peaceful and orderly methods. "*Silent leges inter arma.*" The law is silent during war. When the law is silent no man is safe in person or property. The inculcation of the eternal principles of brotherhood and universal justice alone can prevent war, and peace and progress can only be maintained by the triumph of these principles over greed and wrong. To resist oppression or threatened danger by force is a law of necessity, and can only be evoked under circumstances where the law can not be put in motion in time to prevent the threatened danger. To permit a man to be a law unto himself is a call to anarchy.

Freedom of will not inconsistent with the rights of others is

the very foundation of liberty. A man may be in error in exercising his will or choice of conduct. In such case, however, reason and not coercion is the only remedy that justice prescribes. Intelligent persuasion leads and guides the will, while conduct amounting to undue influence and intimidation dominates and enslaves the will. Law springs from conscience, and anything that warps and stifles conscience is destructive of law, order and liberty. The rule of a minority is tyranny, whether the minority be a king and his coterie of nobles, industrial barons who corrupt politics and control legislation for their own benefit, or trade unions who, by coercion, threats and intimidation, prevent those who disagree with them, be those others workers, legislators or judges, from the exercise of their will as conscience, law and judgment dictate, and as experience demonstrates to be for the best interests of society as a whole. The intelligent exercise of the will of man in multitude must control the unrestrained exercise of the will of man in unitude if we would escape anarchistic confusion and social chaos.

The arguments advanced by the parties were clear and comprehensive, the briefs submitted voluminous and exhaustive. The law of the case, however, I am inclined to believe is quite simple, and therefore very few authorities will be cited in the opinion. It is interesting to note that our courts and law writers have closely followed the English doctrine in many respects since 1871. In England since the legislation of 1871-1875, the legality of trade disputes, or strikes as such, has been fully recognized. That is, the cessation or abstention from work by laborers to influence and better employment conditions has been recognized, but the mode and manner of carrying out the strike is subject to certain prescribed conditions. By the Conspiracy and Protection of Property Act of 1875, it was enacted that an agreement or combination by two or more persons to do or to procure to be done, any act in contemplation or furtherance of a *trade dispute between employers and workmen*, shall not be indictable as a conspiracy if such act, if committed by one person, would not be punishable as a crime. This doctrine, somewhat modified, will be found in many American decisions. 16 Colora-

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do App., 25. *Bohn Mfg. Co. v. Hollis*, 54 Minn., 223, where it is held that the number of men who unite to do the act can not change the character of the act from lawful to unlawful. This statement must be taken with certain limitations for if the number uniting be numerous, and their acts amount to coercion and intimidation, it may amount to a conspiracy. See *State v. Glidden*, 55 Conn., 46. By the preponderance of authority, it would seem that where an act would be lawful if done by an individual, it will be lawful if done by a combination, *provided they have no unlawful object in view*. *Doramus v. Hennessey*, 176 Ill., 608.

There will be found, as was said by the court in *Lindsay v. Montana Federation of Labor*, 37 Mont., 264,

“Running through our legal literature many remarkable statements that an act perfectly lawful when done by one person becomes by some sort of legerdemain criminal when done by two or more persons acting in concert, and this upon the theory that the concerted action amounts to a conspiracy. But with this doctrine we do not agree. If an individual is clothed with a right when acting alone, he does not lose such right merely by acting with others, each of whom is clothed with the same right. *If the act done is lawful, the combination of several persons to commit it does not render it unlawful.*”

The italics are ours. So it will be seen that this doctrine depends largely upon motive.

A series of decisions in England, notably *Lyons v. Wilkins*, L. R. 1 Ch. Div., 811 (1896), construed the Act of 1875 to mean that all picketing was illegal except such as was done for the purpose of obtaining and communicating information. To modify the effect of these decisions, the Act of 1875 was amended in 1906. Section 2 of the latter act provides:

“It shall be lawful for one or more persons acting on their own behalf or on behalf of a trades union or of an individual employer or firm, in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information or of *peacefully persuading any person to work or abstain from work.*”

I have underscored the last two lines as containing the gist of modern American decisions upon this question.

Now, note the language found in *Cyc.*, Volume 24, page 834, issued in 1907, a year after the English Act:

“While it has been held that the mere stationing persons near the premises of another for the mere purpose of observing and obtaining information, for the purpose of conveying information to persons seeking or willing to receive the same, or for the purpose of using orderly and peaceful persuasion with those willing to listen, does not in itself constitute intimidation if done in a peaceful manner, the rule has been repeatedly laid down that the keeping of patrols in front of or about the premises of the employer, accompanied by violence or any manner of coercion to prevent others from entering into or remaining in his service, will be enjoined.”

Note again that the language of the text in *Cyc.* has reference to a strike growing out of a labor dispute where the relation of employer and employes existed before the strike had been called, and if the case now before the court is to be regarded as a strike, the language is significant.

Our attention has been called by counsel for the defendants to the so-called *Clayton Act*, passed by the Federal Congress and found in United States Compiled Statutes of 1916, being Section 1243d, which provides that no restraining order or injunction shall be granted by any court of the United States, or a judge thereof, in any case—

“between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent *irreparable* injury to property.”

This act further provides that,

“No such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from *terminating any relation of employment*, * * * or from attending at any place where such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating informa-

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tion, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or employ any party to such dispute, or from recommending, advising or persuading others by peaceful or lawful means so to do.”

There is nothing in this act which contravenes the well considered opinions of Federal courts on the question of picketing in cases theretofore heard and decided by them, but it will be noted that the very language of the English Act of 1906 and of the text in *Cyc.* is incorporated into this act.

In the instant case, or the case now at bar, it is admitted freely and candidly that the purpose is to drive the Peacock Inn restaurant out of business, and of course that would be an irreparable injury, and would not fall within the provisions of the Clayton Act, even if that act applied.

The picket is not only the eye but the right hand of the strike. No strike of any magnitude can be successfully carried out or prosecuted without picketing. Hence nearly all adjudicated cases on strikes deal with pickets and their activities, conduct and methods, and the doctrine in all cases in relation to this subject is a mere amplification or variation of the doctrine laid down in *Cyc.*, as above quoted. It is interesting to note that a close analysis of the English acts, the decisions thereon, the decisions of the Federal and state courts of our country, as well as the language of the so-called Clayton Act, reveal and disclose the pregnant fact that all these decisions, authorities and laws involve trade disputes or controversies growing out of the relation between employer and employees. These acts, the text from *Cyc.*, *supra*, and the decisions referred to, conclusively demonstrate that a trade dispute arises and can only arise where there is a cessation or stoppage of work if there be an intention on the part of both parties to the dispute to resume the relation of employer and employee upon satisfactory settlement of the dispute or the satisfaction of certain specified conditions prescribed or agreed to by one or both of the parties.

It is strenuously insisted, however, by counsel that there does exist a trade dispute between plaintiffs and defendants, for the unions have the right of collective bargaining; that is, they have

a right to say to the plaintiffs, "We want to bargain with you and if you refuse, we will boycott you," and thus create a dispute. According to this theory, a hold-up man has a dispute with a victim who refuses to stand and deliver. It is the old story of the wolf and the lamb who came to the stream to drink. The spoiler, hungry, wanted a quarrel and said, "You have made the water muddy for me while I am drinking." The fleece bearer answered, "Prithee, wolf, how can I do what you complain of? The water is flowing downwards from you to where I am drinking." The other, disconcerted by the force of truth, exclaimed, "Six months ago you slandered me." "Indeed," answered the lamb, "I was not born then." "By Hercules," said the wolf, "then 'twas your father slandered me," and forthwith the lamb was devoured.

Of the 70 or 80 cases cited by counsel in their briefs, not a single one holds it is legal to picket a shop, store or factory with whose proprietor or owner, the men doing or causing the picketing to be done never had any relation as workers or employes. Under such circumstances, that is, under circumstances where picketing is done by a union or its members at or near a store or factory with whom they never had any business or trade relations, it is necessarily done as an aid to a boycott, which is defined by lexicographers and encyclopedists as—

"the refusal and incitement to refusal to have business, commercial or social relations with anyone on whom it is desired or wished to exert or bring pressure."

Therefore it must be held that the defendants in the instant case are engaged in a boycott and not in a strike, and if this is true, and it must be true, the defendants are engaged in an act made unlawful by their own constitution. On page 37 of the constitution of the defendants' international union, by Section 155, it is provided:

"The officers of the international union shall, when called upon to do so, lend every possible effort in aid of members when called out on a strike."

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It will be here seen that the constitution of this union recognizes the definition of strike as given in this opinion, because it specifically provides that the officers of the international union shall, when called upon to do so, lend every possible effort in aid of members when these members are *called out on strike*. Under no other circumstances will aid be given, that is, unless members of the union who are working for some hotel or restaurant are "called out on strike."

By the last paragraph of Section 156 of this constitution it is provided:

"No local union shall under any circumstances be permitted to declare a boycott."

The things complained of by the plaintiffs or the conduct complained of by the plaintiffs, and engaged in by the defendants is, therefore, a boycott and not a strike, and as the constitution of this union makes it unlawful for a local union under any circumstances to declare a boycott, it follows necessarily that the action of the locals in declaring this boycott is illegal and unlawful.

Cooley, in his work on *Torts*, adopting the language of the court in *Gray v. Building Trades Council*, 91 Minn., 171, says, on page 602:

"A boycott may be defined to be a combination of several persons to cause a loss to a third person by causing others against their will to withdraw from him their beneficial business intercourse through threats that, unless a compliance with their demands be made, the persons forming the combination will cause loss or injury to him."

In principle, a boycott, abstractly speaking is legally unassailable. In practice, however, it frequently becomes an illegal conspiracy and the tendency is to get outside the strict line of principle and make a boycott an illegal conspiracy to injure the property and rights of the person or persons on whom it is desired to bring the pressure.

Cooley on Torts, page 603, says:

"As one person may refuse to have business relations with another, so two or more may combine or agree together not to

deal with a particular person for any reason they see fit, and no action will lie, either to prevent the carrying out of this agreement or for damages consequent upon its performance. *But if the agreement includes the influencing of parties outside the combination not to deal with the plaintiff, then it is illegal.*" Citing *Delz v. Winfree*, 80 Texas, 400.

In other words, these unions and the men belonging to them have a perfect right not to deal with this Chinese restaurant, but when they place pickets before the restaurant and induce the public generally not to deal with or patronize the restaurant, then the boycott becomes a conspiracy and is assailable.

A case in point is *Bohn Mfg. Co. vs Hollis*, 54 Minn., 223, where it appears that a large number of retail lumber dealers formed a voluntary association not to deal with any manufacturer who should sell lumber directly to consumers not dealers at any point where a member of the association was carrying on a retail yard, and they provided in their by-laws that whenever any wholesale dealer or manufacturer made any such sale, their secretary should notify all the members of the fact. The plaintiff having made such a sale, the secretary threatened to send a notice of the fact, as provided in the by-laws, to all the members of the association. This was held not actionable and no ground for an injunction. Here the agreement was by retail lumber dealers simply not to deal with a manufacturer or wholesale dealer who sold lumber directly to consumers who were not dealers at a point where a member of the association was carrying on a retail yard. This they had a right to do; but suppose they went farther and sent circulars to people other than the members of their own association, that is, sent their circulars to all retail lumber dealers, whether they belonged to their association or not, then such act would become a conspiracy under the doctrine laid down by Judge Cooley, and would be enjoined.

Again, a railroad company or other corporation has a right to refuse to employ a man who has left its service or who has been discharged for causes other than those growing out of a trade dispute or as to conditions of employment, and it has the right to notify all its agents or heads of departments in any part of

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the country not to employ this man, upon the theory that it is a part of every man's civil rights, as Judge Cooley says:

“that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern.” *Cooley on Torts*, 3rd Ed., 587.

But suppose a railroad or other corporation having thus exercised its right to refuse employment to the man in question, should request other railroads or corporations not to give him employment, then we have a boycott clearly amounting to a conspiracy that is unlawful and therefore actionable.

The boycott, when it becomes a conspiracy, is pernicious, vicious and vindictive, as well as destructive of personal rights, freedom of action and freedom of will. This, organized labor thoroughly understands, as it has suffered greatly from capitalistic boycotts, so much so that courts and legislatures have been called upon to prevent the activities of employers in this respect. In our own state, Section 12493 General Code, makes it a criminal offense to prevent men from forming or belonging to lawful labor organizations or to discharge men because of their connection with such organizations. The employer's blacklist has brought untold suffering and misery upon women and children whose husbands and fathers were backlisted.

Labor is property in every sense of the word, and to prevent a man from entering the markets of labor which should be free to all men is an invasion of the most fundamental of all human rights, and this belongs to all men, even Chinese residents of the United States. In this connection, I seriously question the good faith of the defendants. These Chinese they hold are not fit to associate with them in their union, and yet they say they are willing to accept a Chinaman as task-master and boss. It seems most incredible that self-respecting men would be willing to be subject to orders or to accept wages from a man with whom they will not associate socially or otherwise. The attitude of the defendants is inconsistent and their conduct must be re-

garded and held to be a deliberate attempt to destroy the business of the plaintiffs.

Perhaps the reason is not difficult to find. The public would not patronize a Chinese restaurant in preference to one run by a white man unless the food and service were better and the *exactions* less. To speak plainly, the public is growing weary of paying exorbitant prices for food and also paying the wages of waiters. The testimony shows that proprietors of hotels and restaurants pay waiters two dollars a day for ten hours work, but that the actual average compensation of waiters is between five and six dollars a day. It was wholly unnecessary to ask who pays the additional three or four dollars. Undoubtedly the public will patronize restaurants where food is good and reasonable and *exactions* not openly enforced—where tips are accepted as gratuities with thanks and are not expected as a right, which right, if not recognized by the patron, will result in ignoring the patron or giving him bad or indifferent service upon his subsequent return to the restaurant or hotel.

Counsel for defendants insist that the waiters or partners in this Chinese restaurant do not receive the same wages that union men receive, and are required to work longer hours. Indeed it is claimed that the waiters in plaintiff's restaurant have not been paid any wages since the opening of the place. This is perhaps true, and for the reason that because of the boycott being forced upon this restaurant, it is unable to pay its employees or its partners or make any distribution of assets. Having destroyed the business of the plaintiffs, it comes with bad grace from the defendants to say that the plaintiffs are unable to pay their waiters or make any division of assets among their partners. So far as the hours of labor are concerned, we are not concerned with this question particularly, for the reason that waiters in hotels and restaurants between meals are practically idle, as the transient custom that comes in between meal times is so small that but few waiters are required to wait upon or take care of such customers.

Our attention has been frequently called by counsel for defendants to the case of *Moore v. Bricklayers Union*, 10 O. D. Reprint, 665, and it is claimed that this case clearly enunciates and

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lays down the law as found in Ohio today. An examination of the facts in the case shows that the bricklayers union requested Parker Brothers, who were contracting bricklayers, first, to pay a fine imposed upon one of their employees who was a member of the union, and second, to reinstate one apprentice who had left them, and discharge another. This Parker Brothers refused to do. The union then declared a boycott against them and directed the manner in which it should be carried on. This was clearly a trade dispute. In the third part of the syllabi it is said:

“A combination by a trade union and others to coerce an employer to conduct his business with reference to apprentices and the employment of delinquent members of the union, according to the demand of the union, by injuring his business through notices sent to his customers and material men, stating that any dealings with him will be followed by similar measures against such customers and material men, is an unlawful conspiracy.”

I fail to see how counsel can derive any comfort or satisfaction from the law in this case. In the opinion, however, our attention is expressly called to the *obiter* of the learned Judge, wherein it is said:

“Every man * * * is entitled * * * to carry on his business, to bestow his labor or to exercise his calling, *if within the law*, according to his pleasure. Generally speaking, if, in the exercise of such a right by one, another suffers loss, he has no ground for action. Thus, if two merchants are in the same business in the same place, and the business of the one is injured by the competition, the loss is caused by the other's pursuing his lawful right to carry on business as seems best to him. In this legitimate clash of common rights, the loss which is suffered is *damnum absque injuria*. * * * And so it may be said that in these respects, what one workman may do, many may do, and many may combine to do without giving the sufferer any right of action against those who cause his loss.”

We have already said in this opinion that this is the law, but suppose we carry the illustration still further. If one of the merchants referred to by the learned Judge finds that his competitor is getting the best of him, has he a right to place pickets

in front of his competitor's door and instruct them to call out to the public passing by that door, "Do not patronize this man, for he is a Catholic," or "he is a Jew and is unfair to Christians and does not employ Christian labor" or that "he is not a citizen of the United States and therefore should not be patronized by citizens?" Surely under such circumstances counsel for the defendants would not contend that such action was legal or lawful.

It is further contended by counsel for defendants that even if the pickets exceed their authority or do things which the law holds to be illegal and unlawful,

"it is the individual act of a particular picket, who is subject to the discipline of the union, but it is not the act of the union."

This is a strange doctrine. It is generally held and is the law that if the servant of one man maliciously injures another while in the scope of his employment or while doing something which may be beneficial to his master, the master will be liable for such malicious acts; and it is further held that if there is any doubt as to whether the servant was acting within the scope of his employment or not, the master will be held liable, upon the theory that he put the servant in motion and is responsible for the acts of the servant because he put him in motion. The union put these pickets in operation and must be held responsible for whatever they do. The pickets were upon the ground, they had charge of the picketing and were given charge by the union. The case of *Nelson Business College v. Lloyd*, 60 O. S., 448, is clearly in point. See syllabus and opinion page 453.

If the pickets or any of them performed some act against some individual person because the picket had ill-will or malice against such person and availed himself of the opportunity and situation to injure him, and his purpose was to injure or annoy such person merely to gratify his spirit of malice or ill-will, then it would be a departure from his employment and the union would not be liable, and the doctrine of *Railroad v. Wetmore*, 19 O. S., 110, would apply.

It is further contended that all the things done by the pickets and their conduct in this respect, have been strictly within the law. This we will refer to hereafter.

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We call attention now to the doctrine laid down by *Cyc.* in the text, Volume 24, page 834, that while picketing may be lawful for the purpose of conveying information to persons seeking or willing to receive it, or for the purpose of using orderly and peaceful persuasion to those willing to listen, if done in a peaceful manner, yet the keeping of patrols in front of or about the premises of an employer, accompanied by violence or any manner of coercion to prevent others from entering into or remaining in the service, will be enjoined.

Coercion involves restraint. It will be idle to say that the conduct of these pickets, as it will be referred to hereafter, has no restraining effect upon patrons of the plaintiff's restaurant. In law, intimidation is the wrongful use of violence or threats of violence, direct or indirect, against a person with the view of compelling him to do or abstain from doing, some act which he has a legal right to do or abstain from doing.

If a picket practically blocks the door of the restaurant and requests people in a loud voice not to enter therein, timid men and ladies may not care to run the chance of an altercation with the picket, and they are indirectly compelled to refrain from going therein or doing what they desire to do, though that may be their wish and purpose.

Let us look at this matter squarely and take a rifle shot at it. It is admitted by all parties to this controversy that the Peacock Inn is a respectable restaurant and has been patronized by some of the best people in the city. The mere fact that the defendants claim they are seeking employment as waiters in this restaurant is *prima facie* evidence that they consider it a reputable and a respectable place. The testimony shows that large sums of money, perhaps \$40,000, were expended in fitting up and decorating the Peacock Inn and that it presents inside an appearance of almost oriental splendor. Admitting now that it is a place to which any gentleman may take his wife or family, let me ask, is there a public official in the city of Cleveland, who depends upon the votes of citizens for continuance in his office, who would take his family or his friends to this restaurant under present conditions? The city of Cleveland has nearly a million inhabitants. Its mayor should be a man of considerable parts, a man of will, ability and

free from fear. Now, let me ask, would the mayor of this city take his family or his friends, under present conditions, to this restaurant to dinner? If not, why not?

It would be idle and cowardly to mince words in treating this subject. A candidate for office seen going into this place, a lawyer or a merchant or any professional man seen going into this place, under present conditions, will be subject to a species of indirect intimidation more coercive than the actual employment of physical force. Everybody knows this. There is perhaps not a Judge upon the bench of the Court of Common Pleas or the Municipal Court who would today patronize this restaurant while this boycott is on or is being prosecuted. Why? Is it necessary to answer this inquiry?

To constitute intimidation and coercion, physical force is not required. If the will is dominated and overcome by influences which the will can not control, then coercion and intimidation exist.

In the lexicon of the trade union, "peace" is defined to be "war in abeyance—at the will of unseen forces." A "peaceful picket" is as much a self-evident contradiction as is a rod without two ends. In the language of the street, "*there is no such anamile.*"

So far I have been proceeding upon the theory that there is no strike against the Peacock Inn; that the defendants never had any business or trade relations with the proprietors of it; that they never had any men belonging to their union employed by the Inn to be "called out on strike," as provided in Section 155, page 37, of the union's constitution; no man was called out on strike. Under their constitution, no aid or benefits can be legally given to these locals by the international union, or governing body; and the General Executive Board, if it would follow the law, would refuse the locals aid or assistance when carrying on this boycott or strike or whatever they may term it, and would refuse to assume jurisdiction over the boycott or to manage or carry it out.

It is therefore held that no strike or trade dispute exists in connection with the plaintiffs; that under the circumstances no

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strike could exist or be called or declared by the defendants. In the second place, it is held that by the very language of the constitution of the defendants' union, a boycott is unlawful, for, as has been said, it is provided in Section 156 that

“No local union shall, under any circumstances, be permitted to declare a boycott.”

The boycott of the local unions is therefore illegal and unlawful according to their own laws and constitution, and the conduct of the defendants and the locals to which they belong is *ultra vires* and beyond their powers and beyond the powers conferred upon them by the international union or governing body.

But if we admit, for the sake of the argument, that this boycott is in fact a strike, absurd and ridiculous as such an admission would be, what is the situation then presented? The case was heard mainly upon affidavits, although some oral testimony was taken. The plaintiffs filed over thirty-one affidavits. These affidavits were made by disinterested respectable citizens, many of them by ladies of unquestioned honesty. In the first place, the pickets, numbering from three to four in most instances, and in some instances more, are passing out red, white and blue cards, using the colors of our flag, to create bias and prejudice. The men who were doing this seemed to forget that these colors found upon our flag sprung from the Declaration of Independence, which holds that all men are created free and equal, that is, that all men, even including Chinamen residents of the United States, stand equally before the law, that all men have certain inalienable rights, among which are life, liberty and the pursuit of happiness. Upon this card it is said that the local union has 300 stars in its service flag. This is not true. The testimony showed that out of 750 members, about 30 of its members were in France. There is no testimony that a single member of these locals ever went over the top or died in defense of the flag. Evidently none of them were volunteers, and all of them were selected men and held off as long as they could, because of the 200 men they say were selected from 750, all but 30 were in camps in the United States. Hence the appeal to patriot-

ism is not founded upon fact or justice or right, and is unfair. Affidavits filed by the plaintiffs show that persons in the restaurant could plainly hear the pickets shouting in the street below; that the door of this restaurant, or the door leading to the restaurant, is about three and a half feet wide; that the pickets walked within two or three feet of the front of this door, and rarely, if ever, walked more than a few feet east or west of the door; that they continually shout in a loud voice, "Do not patronize this Chinese restaurant, they belong to the yellow race, they are coolies; they will not employ returning soldiers." A favorite cry of the pickets to respectable and decent women was, "Hello, sweetheart;" and one gentleman who took his wife to the restaurant said that a picket said to him, "I see you have your soubrette with you." In order to enter the restaurant, patrons have to pass around, jostle and collide with these pickets. Some of the affidavits say that the remarks addressed to them and their ladies were unprintable. Many women in their affidavits swore that the picket said to them, "This is no place for a woman to go," that the language of the pickets was loud and boisterous, and that the pickets menacingly brushed against them. In one of the affidavits it is alleged that one of the pickets said to the affiant that the object of the union was to drive the Chinese out of the town. Most of the affidavits claim that the pickets obstructed the entrance to the restaurant and used insulting language to women. Indeed, one of the pickets who testified for the defendants admitted that he insulted a respectable woman and attempted to give some lame and impotent excuse for his unmanly and cowardly conduct.

The defendants introduced considerable testimony to rebut these affidavits. The pickets invariable, except in one or two instances denied that they used insulting language or made insulting remarks to women or were loud and boisterous in their language. Being interested in the controversy, their testimony will not prevail over that of wholly disinterested witnesses. Quite a number of affidavits of disinterested citizens were introduced on behalf of the defendants, in which they set forth that they had passed by this restaurant at various times and saw nothing wrong, but this testimony is wholly negative. I passed

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by this place since the boycott was declared and was wholly unaware that there was any trouble or that there were any pickets stationed in front of the restaurant or even that there was a restaurant located at this point, but on Saturday, June 7th, I went by there twice between 12:45 and 1:30 p. m. and saw a picket walking directly in front of the door of the restaurant on both occasions, not more than two feet from the door, nor did he go more than two or three feet east of the door or two or three feet west of the door. He was crying in a loud voice, "Patriotic citizens will not patronize this Chinese restaurant upstairs. It is unfair to union labor." No lady, under the situation as I saw it, would undertake to pass by this picket as she would run the risk of colliding with him. The citizens who testified by affidavit or orally that they saw nothing wrong, may have been entirely within the truth, as they may have passed by there at a time when the pickets were not active. None of these citizens, deny, and it is quite probable that they could not deny, that what the affiants for the plaintiffs state is true.

It is a general rule of evidence, as laid down by *Jones on Evidence*, Section 898, that

"Affirmative testimony is stronger than negative; in other words, that the testimony of a credible witness, that he saw or heard a particular thing at a particular time and place is more reliable than that of an equally credible witness, who, with the same opportunities, testifies that he did not hear or see the same thing at the same time and place. The reason for this rule is that the witness who testifies to a negative may have forgotten what actually occurred, while it is impossible to remember what never existed."

But the fact is that citizens who testified that they saw nothing wrong undoubtedly passed by the place at periods during the day when the pickets were not active, that is, at periods other than at meal times. There is no doubt in the mind of the court, and the court so holds, as a matter of fact, that the evidence clearly discloses that the conduct of the pickets during the times at least that meals are being served in this restaurant, amounts to coercion and intimidation.

The conduct of these men raises a presumption that there is something radically wrong in their theory of unionism. There are some propositions of unionism so self-evidently true that it is astonishing that they should be forgotten or overlooked by the defendants' locals. Man can not be elevated and placed so as to remain permanently upon a high social plane by mere physical force alone. If you take a young robin that has not yet fully learned to fly, to the top of Eiffel Tower and throw it off, it will reach the ground, if alive, in a sadly damaged condition. Man and society have been progressing slowly but surely along parallel lines for countless ages. During these ages, civilization has flowed and ebbed but each flow reached a higher mark. The theory was beautifully and admirably expressed by Mr. Cline, of counsel, who compared the progress of civilization to the flight of an eagle, who high in the air, alternately downward glidingly swoops, then upward sweeps and zooms to a higher level. The trouble with this simile is that if the sweep and zoom of the eagle upward is too rapidly continuous, he may get out of sight of the earth and all old familiar landmarks. Then when exhausted, he descends, he may find himself just above a heaving, tumultuous, elemental lashed ocean or a barren waste or arid desert, where everything necessary to sustain life is wanting. In either event, it means death to the adventurous eagle. We all want improvement and progress in social conditions, but the wise, conservative man desires to advance progressively, retaining permanently every vantage point gained until the ultimate goal is reached, while the radically adventurous man desiring to reach the same goal by leaps and bounds, invariable falls by the wayside, evidence of the fact that social advancement follows natural lines and cannot be forced, for the simple reason that practically all the integers of society must come up together. Hence intellectual progress is indispensable. As man advances, his needs and necessities act as a *vis a tergo* to effort and activity. Culture and manhood do not depend upon wealth. I have seen millionaires who were instinctively clownish and boorish, while at the same time I have seen men covered with the mud and dirt of the sewer they were engaged in constructing, who could pass a compliment and treat a lady with all the refined courtesy of a courtier of the time

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“when knighthood was in flower.” When men acquire or innately have the instincts of refined manly manhood, they will demand and receive wages or salary commensurate with the necessities their instincts necessarily create.

Thomas Brassey, an English contractor building a road in India, advanced the wages of his Hindoo laborers from six to twelve cents a day. The result was that they worked but half time. Six cents a day supplied all the demands of their social condition, and as more was not required, they could not be induced to work more than half time.

Mr. Gunton, a New England writer on political economy, once said that the man who refused to permit his wife and children in the mills eventually earned as much money as the man who did so. That is, the necessity was met and the man arose to the emergency confronting him. Experience demonstrates the truth of this proposition; but where men rely upon others or upon society to care for their needs, they become social crabs and glide or slip backward in the social scale. Hence, while organized effort to obtain better conditions of employment is to be commended, it will fail unless the efforts are primarily based upon the ethical and intellectual development and elevation of the workers. Strong-armed methods end in failure.

For the reasons indicated, the prayer of the petitioners will be granted, and the attorneys for the petitioners may draw a Journal Entry in accordance with this decision.

The defendants are given an exception.

REGULATION OF THE SALE OF MILK.

Common Pleas Court of Clark County.

WILLIAM H. BITNER v. THE STATE OF OHIO.

Decided, November 3 1919.

Milk—Adulterated and Skimmed—Removal of Some of the Butter Fat—Requires Designation of what Remains as "Skimmed Milk"—Notwithstanding the Butter-Fat Content is Still above 3 Per Cent.—All Concerned in the Sale of Milk Not Properly Labeled Liable to Prosecution.

1. Section 12717, defining what shall be deemed to be adulterated milk, and Section 12720, providing a penalty for selling milk from which the cream or any part thereof has been removed, unless in a conspicuous place on the outside of each package in which the milk is sold is marked the words "skimmed milk," are independent statutes—the one defining adulterated milk, and the other providing a penalty for selling without the proper designation, milk from which the cream has been removed.
2. One selling, or having in his possession with intent to sell, milk from which the cream or a part thereof has been removed, without the designation "skimmed milk" provided by Section 12720, is guilty of an offense, even though the product after removing a portion of the cream, may exceed three (3) per cent in butter fat.
3. The sale of milk resulting from the process of "standardization," by which skimmed milk is mixed with natural milk of a higher degree of butter fat, so as to produce a mixture having a butter fat content of 3.5 per cent, without marking upon the package in which the milk is sold the words "skimmed milk," as provided by Section 12720, is a misdemeanor.
4. In a prosecution under said act, it is not a defense that the accused was the general manager of the corporation, and did not personally sell, or have in his personal custody or possession with intent to sell, the milk in question. If he was general manager of the corporation, having under his control the servants operating the plant, he may be prosecuted as principal.

*Keifer & Keifer and Stewart L. Tatum for plaintiff in error.
Robert Flack, contra.*

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GEIGER, J.

The plaintiff in error was tried in the police court of the city of Springfield, and convicted of the violation of Section 12720, G. C., which provides in substance that whoever sells or has in his possession with intent to sell, milk from which the cream or part thereof has been removed, unless in a conspicuous place upon the outside of each vessel in which the milk is sold, the words "skimmed milk" are distinctly marked in uncondensed Gothic letters, not less than one inch in length, shall be fined not less than \$50 nor more than \$200.

The plaintiff prosecutes error, alleging seven different grounds on which he claims the court below has committed error, among them being that the judgment of the court is not sustained by sufficient evidence, and is contrary to law.

Testimony was introduced in the court below tending to show that the plaintiff in error, Mr. Bitner, was the general manager of the Springfield Dairy Products Company; that at the Pure Milk branch of said company, located on North Fountain avenue, on the morning of the 12th of June, four samples of milk were secured; that one sample was taken from a ten gallon can containing producers milk, which was being poured by an employee of the company into the weighing vat, which vat had a capacity of about fifty gallons. At the same time a sample was secured from another can, designated by the witness as containing skimmed milk, from which can milk was being poured into the same weighing vat into which the producers' milk was being poured. From the weighing vat containing 50 gallons, the milk passed into an agitating vat containing about 500 gallons. As the milk passed from the weighing vat into the agitating vat, a third sample was secured. The milk from the agitating vat passed into pipes and down onto the lower floor where it passed through several other vats designated as the heating vat, the clarifier and pastuerizer, from whence it went into the bottle filler.

The fourth sample was taken from the filled bottle, capped and about to be placed in the ice chest where it was cooled preparatory to delivery.

The four samples so taken were delivered to the state chemist, who made an examination of the same, testifying that he tested the samples by two methods, one known as the Reese-Gotlieb method, and one as the Babcock method.

These tests disclosed the fact that sample No. 1, taken from the producers' can, had a butter fat content of 8.3 per cent.; that sample No. 2 taken from the can being poured into the weighing vat together with the producers' milk, contained 2/10 of one per cent. of butter fat; that sample No. 3 taken at the point where the milk leaves the weighing vat, contained 3.5 per cent butter fat, and that sample No. 4 taken from the filled bottle near the ice-box, contained 3.45 per cent of butter fat. Butter fat is cream.

These per cents were obtained by the Babcock test. The per cents obtained by the Reese-Gotlieb method disclosed a slightly different per cent. of butter fat content in all four of the samples.

It appears from the evidence that the bottle into which the milk flowed from the bottling machine, and in which it was to be sold, was not in any way marked as containing skimmed milk.

The Springfield Dairy Products Company has a large number of delivery wagons, from which they daily distribute an average of more than 10,000 bottles of milk and cream to the citizens of Springfield, bottled at this plant.

Much testimony was submitted covering the methods in vogue in various milk distributing plants, including that conducted under the direction of the Ohio State University.

The defendant did not go upon the stand, and no testimony was introduced on behalf of the defendant directly admitting that the milk sold by his company was brought to a fixed standard of butter fat content by the admixture of skimmed milk; neither was any testimony introduced by the defendant directly denying this to be the fact.

Much evidence was introduced by which it is attempted to be shown that milk of a fixed daily standard of butter fat content is more beneficial to the consumer than milk which might vary from day to day, depending upon the richness of the milk deliv-

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ered by the producers, and it was testified that the milk given by various herds or individual animals might vary from day to day, depending upon many things, such as the breed of the herd, the condition of the weather, and the character of the food.

It is admitted that milk delivered by the producers was paid for in accordance with its butter fat content, and that the money value of milk depended upon this.

Several methods of standardizing milk to a fixed butter fat content were described, one of which is to mix the whole milk from different producers furnishing milk of a varying degree of butter fat, so as to raise that containing a low per cent., and reduce that containing a high per cent. Another method is to extract skimmed milk from whole milk of a low percent. of butter fat, or add it to that having a high per cent. Milk containing a low per cent. of butter fat may also be enriched by adding cream so as to bring the milk to a given standard.

No evidence, however, appears from which it can be gleaned that any of the products of the Springfield Dairy Products Company were enriched above their natural state by the addition of cream or the extraction of skimmed milk.

However, it does appear that the method pursued by this company was to add milk from which practically all butter fat had been extracted and which was as near skimmed milk as machinery could make it, to the whole milk as delivered by the producers, so as to reduce the butter fat content from that of the whole milk to a fixed standard of about three and one-half ($3\frac{1}{2}$) per cent.

The statutes of Ohio provide that if milk is shown, upon analysis, to contain less than three per cent. of fats, it shall be deemed to be adulterated. The evidence shows that the milk sold by the company contained more than three per cent. of butter fat, to-wit, about 3.5 per cent.

The defendant below not admitting that this method of mixing skimmed milk with whole milk prevailed at the plant of which he was the general manager, sought to show that this was the general method of standardizing milk practiced throughout the state of Ohio, and taught at the Ohio State University, and practiced by the dairy under the control of the University.

It is sought to be shown that milk of 3.5 per cent. butter fat is the most wholesome for children, and that a higher per cent. of butter fat, especially if the same varied from day to day, would be highly deleterious to the infant consumer.

The first question to be determined by the reviewing court is whether or not the verdict of the court below is against the manifest weight of the evidence.

This court is quite satisfied that the trial court was correct in so far as it may have found that the defendant below was the manager of the company which had in its custody, with intent to sell, milk which was brought to a fixed standard of butter fat content by the admixture to the whole milk delivered by the producers, of skimmed milk, so as to reduce the per cent. of butter fat content.

The court is more ready to arrive at this conclusion from the fact that the defendant himself did not go upon the stand, and that no attempt was made, except by inference, to deny the existence of this process, which was directly testified to by the witnesses for the state.

Upon this state of facts various legal contentions are based. First, it is urged there is no evidence that the defendant. Mr. Bitner, was guilty of the act charged; but it appears in evidence that he was the general manager of the company, and as such had direction and control of the production and distribution of the milk.

The offense charged against the defendant is a misdemeanor. In misdemeanors all are principals, and though the milk may have been kept for sale by the corporation and distributed by the agents of the corporation other than the defendant, all those who are connected with the custody or possession of the milk, with intent to sell, would be liable to the penalty of the statute. *Miller v. The State*, Ohio Law Rept., October 13, 1919, page 106; *Williams v. The State*, 4 C. C. (N. S.), 193; *Myer v. The State*, 54 O. S., 242; *State v. Kelly*, 54 O. S., 166; *State ex rel v. Capitol City Dairy Company*, 62 O. S., 350.

The original act (86 O. L., 229), of which the present statute is an amendment, provided, "no dealer in milk, and no servant

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or agent of such dealer, shall sell," etc. The present statute provides, "Whoever sells," etc. The amendment does not narrow the original in respect to those who shall be guilty. The principal and all servants and agents may be alike guilty.

The main defense is upon the construction to be placed upon the various sections of the statutes in reference to the selling of milk and its products—Sections 12716 to 12727, G. C.

Section 12716 provides that in all prosecutions under the chapter, if milk is shown, upon analysis to contain less than three per cent. fats it shall be deemed to be adulterated.

Section 12719 provides that whoever sells, or has in his possession with intent to sell as pure milk, any milk from which the cream or any part thereof has been removed, shall be punished.

Section 12720 provides that whoever sells or has in his custody with intent to sell, milk from which the cream or any part thereof has been removed, unless in a conspicuous place upon the vessel containing such milk, there is displayed the words "skimmed milk," shall be punished.

Counsel for defendant take the position that the statutes should be read together, and that no prosecution can be had under the statute in reference to the sale of milk for deficiency of butter fat, if the milk sold contains more than three per cent. of fats, as provided in Section 12716.

On the other hand, it is urged by the state that Section 12716 stands alone, and provides what shall be deemed to be adulterated milk. If the milk, among other defects enumerated by the statute, contains less than three per cent. of fat, it shall be deemed to be adulterated. As to what is adulterated milk, see *State v. Smith*, 69 O. S., 196.

It is urged by the state that this section of the statutes, which penalizes the sale of "milk from which the cream or a part thereof has been removed," makes it unlawful to sell any such milk as pure milk, or without labeling the container with the words "skimmed milk," even though such milk may contain a butter fat of more than three per cent.

It is admitted by the state that whole milk of varying degrees

of richness of butter fat may be mixed so that the product may be less rich than that having the highest degree, and richer than that having the lowest, but it is insisted it is an offense to extract from any of the whole milk any cream, and sell the resulting product either as pure milk, or without the designation, "skimmed milk."

The court is of the opinion that these sections are independent of each other; one defining adulterated milk, with the appropriate penalty; another providing for a penalty for selling as pure milk that from which the cream or any part thereof has been removed, and one providing a penalty for selling milk from which the cream or any part has been removed without the proper designation.

Adulterated milk and skimmed milk are not the same. The statute arbitrarily defines adulterated milk as that having less than three per cent. of butter fat, irrespective of how such deficiency occurred, whether by the thinness of the original milk, the removal of the cream, or the addition of water.

To designate a milk as adulterated brands it as of much lower food value than skimmed milk, in the consideration of the public. The Supreme Court has sustained the validity of this definition in *State v. Smith, supra*.

The court is convinced that the state has the power to designate as skimmed milk that from which the cream or any part thereof has been removed, and to require the seller to designate such as skimmed milk.

The fact that the product from which some of the cream has been removed, has still enough cream remaining to prevent it being branded as adulterated milk, the sale of which is forbidden, does not permit its sale either as pure milk, or without the designation "skimmed milk."

The court does not hold that milk containing less than three per cent. butter fat may not be sold under certain conditions; that question is not now before the court.

It appears to the court that there is much value in these statutes defining different qualities of milk and preventing their sale except under certain restrictions. There is no prod-

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uct that is more important for human consumption, and no product in the sale of which more care should be observed and honesty practiced.

It is quite easy to deceive the consumer by tampering with the natural product, so as to render it less valuable as a food.

If the contention of the plaintiff in error is correct, the public at no time would reap any benefit from the efforts of dairymen to produce a high grade milk, with a high per cent. of butter fat, as the consumer would always be limited to the enjoyment of that which in richness just escapes being branded as adulterated milk.

It is claimed on behalf of plaintiff in error that to deny the right to distributors to standardize milk, would be to render it impossible to carry on a large enterprise such as that conducted by this company, and that the public would suffer in consequence.

The public is more largely concerned in receiving milk which is in fact pure, and from which no cream has been removed, than it is in the success of a large business, which through successive years has acquired more and more a monopolistic control of the milk distribution in this city.

The public is not so much concerned in the high-sounding processes of "pasteurization," "clarification," "standardization" and "certification," as it is in receiving the pure wholesome product of the herds.

Counsel for plaintiff in error insist that to brand their standardized product as "skimmed milk," would be unconstitutional as destroying their property without due process of law, stating that to compel them to designate this milk "skimmed milk," would be to destroy a large part of its value, and take away the right of private contract to deal with a legitimate and harmless article of commerce.

It is too late to argue that the state has not the constitutional power to control the quality of the food distributed to the citizens. See *State ex rel v. Capitol City Dairy Company*, 62 O. S., 350; affirmed by the U. S. Supreme Court.

It is claimed further that these statutes are unreasonable and oppressive, and that during the thirty years since their passage,

no court has ever been called upon to enforce them. This may be true, but does not prove that they are not wholesome and constitutional provisions for the protection of the public.

The public has the right, under this statute, to receive the natural milk, undiluted, either by the addition of water, or the subtraction of cream, and neither the high-sounding phrases nor opinions of experts can deprive them of this right.

If the plaintiff in error desires to take from the natural milk, cream, so it may derive an additional revenue from selling it as cream and double cream, the public has the right to be informed that the product it receives is such that the state requires it to be branded as "skimmed milk."

The argument that the company will be deprived of a valuable property right by requiring it to label its product "skimmed milk," does not have weight with the court, in that the company can easily avoid this by selling the milk in its original purity and foregoing the extra profit that arises from selling a portion of it at high rates as cream and double cream.

Petition in error dismissed, and cause remanded for execution.

**PERIODS TO WHICH WORDS OF SURVIVORSHIP
SHOULD BE REFERRED.**

Decided, September 15, 1919.

H. E. WOOD ET AL, ADMINISTRATORS, v. JAMES J. WOOD ET AL.

Common Pleas Court of Clark County.

Wills—Devises to Children—Effect of Condition of Survivorship and Intervention of a Life Estate—When Estates in the Children Become Absolute.

Where a testator bequeaths his property to his wife during her life, with the provision that after her death it shall be divided among his children and in the event of the death of any of the children without issue or heirs their shares shall revert to the surviving

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heirs of the testator to be divided equally among them, the intervention of the life estate fixes survivorship as of the time of distribution and after termination of the life estate.

J. M. Cole for plaintiff.

GEIGER, J.

Plaintiffs as administrators, ask that the court give its direction and judgment in regard to the true construction of certain items of the will of their decedent, James J. Wood, Sr.

The testator bequeathed his property to his wife during her life time, and provided that after her death the same shall be divided among his children, and if any of the children die without issue or heirs, their shares shall revert to the surviving heirs of the testator to be divided equally among them.

The question to be determined is the nature and character of the estate to be taken by the testator's children under the will. If the bequests had been made without the intervention of a life estate, each child would take an estate in fee simple subject to be determined by the contingency of dying without issue, or heirs at the time of his death, on the happening of which the estate of such child so dying would pass over to the surviving heirs of the testator by way of executory devise, unless the contrary intention is plainly expressed in the will. *Parrish v. Ferris*, 6 O. S., 563; *Niles v. Gray*, 12 O. S., 320; *Taylor v. Foster*, 17 O. S., 166; *Piatt v. Sinton*, 37 O. S., 353; *Durfee v. McNiel*, 58 O. S., 238.

The question is whether or not the intervention of the life estate of the testator's widow changes the rule laid down in these cases, and fixes the time of survivorship as of the time of distribution after the termination of the life estate.

It will be noted that in all the cases above cited, none is found where the devises are made subject to a life estate. In each case the condition of the will is that if the primary devisee shall die without issue then the estate shall pass over as provided by the will.

In the case at bar the estate is not to be divided among the children until after the termination of the life estate of their mother.

In the construction of wills, words of survivorship should be referred to the period appointed by the will for the payment or distribution of the subject matter of the gift, unless the contrary intention is evidenced by the language of the will. *Sinton v. Boyd*, 19 O. S., 30.

An interesting case is that of *Miller v. Miller*, 10 O. N. P. (N.S.), 630, affirmed by the Supreme Court without report, 88 O. S., 563.

See also: *Pendleton v. Bowler*, 11 O. Dec. (Reprint), 551; 27 W. L. B., 313, affirmed without report, 54 O. S., 654.

Without going into detail the court is of the opinion that the provision of Item 10, that if any of the testator's children die without issue, their share shall revert to the surviving heirs, refers to the death of such child prior to the death of the life tenant, and the distribution of the estate. Therefore, as the children have survived their mother, the estate became absolute in each of such children upon the termination of the life estate of the mother.

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ADMISSIBILITY OF EVIDENCE IN A WILL CONTEST.

Common Pleas Court of Hamilton County.

AMELIA OTTE ET AL V. EDNA OTTE BULLOCK ET AL.

Decided, 1919.

*Wills—Contest of—Declarations by Testator Prior to Making the Will
—Declaration by Beneficiary that She Would Get the Entire Estate
—Admissible for the Purpose of Showing Undue Influence on Her
Part.*

1. Declarations made by a testator five years before executing his will are not too remote to have probative value, where it appears that they were made prior to a disruption of the family and the exercise by a daughter of the undue influence which it is claimed resulted in practically the entire estate being devised to her.
2. A statement by said daughter asserting her influence over her father and that she would get her father's entire estate is admissible on the issue of alleged undue influence exercised by her.

Arthur C. Fricke and Theodore Horstman, for plaintiffs.

Robert A. Black and Leonard Carter, contra.

MATTHEWS, J.

This is an action to contest the will of Frederick Otte, deceased. The jury returned a verdict declaring the paper writing not to be his last will, and the case is now before the court upon a motion for a new trial.

The decedent left surviving him seven children. By the paper writing dated March 20, 1916, probated as his last will, he bequeathed \$200 to a divorced daughter-in-law, and gave the balance of his estate consisting largely of realty and valued at approximately \$15,000 to his daughter, Edna Otte Bullock, whom he named executrix. In this paper writing he recited that his other six children had not shown him the respect and affection due him as their father, and gave that as the reason for disinheriting them.

The evidence disclosed that in 1911, the family of the decedent divided into two hostile factions. While there had been

dissension in the family for some years, the final disruption was postponed until that date. The circumstances and cause of the division in the family were in dispute. There is no doubt that the subject of the dispute which caused the division of the family was Edna Otte Bullock. Those children who were contesting the will claimed that at and prior to that time Edna Otte Bullock had acquired a dominating influence over her father, and that she used that influence to cause him to take a hostile attitude toward his wife and all the other children. The decedent at that time served legal notice on two of his children to leave his home, and as a result of the controversy the mother and all the children who were then living at home, other than Edna Otte Bullock, left and never returned thereto. Edna and her father continued to live in the home property until his death in December, 1917, and during that time, to-wit, on March 20, 1916, the decedent executed the paper writing which was probated as his last will. From the time that the mother left home and the other children sided with her, there was no friendly communication of any sort between the decedent and them. During that period the wife prosecuted an alimony suit against the decedent, and in that case her children, other than Edna, rendered her such assistance as they could. The contestants relied on undue influence and testamentary incapacity to set aside this paper writing as a will. At the trial the court admitted evidence of declarations made by the decedent, just prior to the disruption of the family, for the purpose of showing his attitude toward the various members of his family, and also for the purpose of showing his testamentary intentions toward them at that time. The court also admitted declarations made by Edna reciting her influence over her father, and of her purpose to use that influence.

It is urged now that the court erred in admitting declarations made by the decedent at that time, on the ground that those declarations were too remote from the time when the will was made. The court admitted the declarations on the theory that inasmuch as the contestants claimed, and produced evidence from which the legitimate inference could be drawn, that

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prior to 1911 Edna had acquired a dominating influence over her father, and that this influence culminated in 1911 in causing her father to allow his wife to leave their home and to disown all his other children, and that this influence was exclusive from that time to the time of the making of the will, and that therefore the intention and mental attitude of the decedent just prior to the acquiring of this exclusive domination over the decedent were obtained, were material as being evidence of the last free exercise of his faculties and affections. The court is now of the opinion that such declarations, in view of the particular circumstances of this case, were not too remote to have probative value.

It is also objected that there was no substantial evidence of undue influence, and that therefore the court erred in charging the jury upon that subject. There is no objection to the charge as given, but it is urged that that issue should not have been submitted at all. The court is of the opinion that there was evidence of undue influence; that, like most cases involving this issue, the evidence was circumstantial and inferential, but that it was sufficient to justify the court in submitting the issue to the jury, and that therefore the court did not err in instructing the jury upon the law applicable to undue influence. However, inasmuch as there were two issues submitted to the jury, even if the court did err in submitting one of them, that would be no ground for disturbing the general verdict, unless it also appeared that the court erred with reference to both issues.

This rule was recently reaffirmed in the case of *Niemes v. Niemes*, 97 Ohio St., 145, in which the court, at page 149, said:

“We are still further of opinion that if it be granted that the improper inclusion of the language as to the several species of undue influence—which was entirely unsupported by proof—was prejudicial error, the defendant in error can not take advantage of the error, being precluded therefrom by the doctrine first asserted in Ohio in the case of *Sites v. Haverstick et al* 23 Ohio St., 626, and recently reasserted in *State, ex rel Lattanner, v. Hills*, 94 Ohio St., 171, 182. This well known rule of law is that where, upon the issues made by several defenses to a claim sued upon, a general verdict is found for the defendant, it not

being disclosed by answers to interrogatories or otherwise upon which issue the verdict was based, and the record disclosing no error touching either the presentation or submission of at least one of such issues, a finding upon which in favor of the prevailing party would justify a general judgment which is rendered, error of the trial court in the submission of other issues will be disregarded."

It is urged more strongly, however, that the court erred in admitting evidence of declarations made by Edna Otte Bullock as to her influence over her father and her declaration that she would get all the estate.

It is urged that this evidence comes within the inhibition of the rule announced in *Thompson v. Thompson*, 13 Ohio St., 356, in which it was held that where there are several devisees or legatees whose interests may be injuriously affected, declarations by one devisee or legatee in reference to the mental capacity of the testator, are inadmissible. In that case the court refused to admit evidence to the effect that one of the beneficiaries had informed the witness that the testator was insane and incapable of transacting business.

Counsel also relies on the recent case of *Seal v. Goebel, Excr., et al*, 11 C. C. (N. S.), 433, as supporting his contention. In that case the court excluded evidence of what a beneficiary had stated after the will was made, tending to show that the will as drawn was not in conformity to the intention of the testator, and the court in excluding this evidence followed *Thompson v. Thompson, supra*, saying:

"We think it well settled that declarations of a party to the record of a case, who is a legatee with others under the will, in a suit to contest the will, are inadmissible to prove that the will was contrary to the testator's intentions or was procured by undue influence, other parties or legatees being affected thereby."

In the opinion of the court, there is a clear distinction between the evidence admitted in this case, showing the mental attitude of Edna, and the evidence excluded in *Thompson v. Thompson* and *Seal v. Goebel*. In the latter cases the declarations were made after the transaction and simply constituted

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the opinion of the witness as to a past transaction or condition, whereas, the evidence admitted in the case at bar in no sense related to something that had occurred in the past, but was simply a verbal manifestation of an existing design and purpose. In the opinion of the court its admission was authorized under the rule laid down in *Schock v. Schock*, 6 C. C. (N. S.), 110, the third paragraph of the syllabus of which is as follows:

“Declarations of a witness which tend to show the state of mind of the witness, and which afford circumstantial evidence of her purpose and design in treating the testatrix as she did in her last illness with apparent kindness and affection, are admissible.”

This whole subject of the admissibility of the declarations of a beneficiary is elaborately discussed in a note to the case of *James v. Fairall, Excr., etc.*, 38 Lawyers Reports, Ann. (N. S.), 731, and the annotator analyses and classifies the various forms of declarations, and among other cases referred to is the case of *Schock v. Schock, supra*. He classifies this case under the heading of “To show intent or disposition.” His entire note under that heading is as follows:

“Sometimes such declarations will be received not for the purpose of invalidating the will directly, but to show general intent or disposition of declarant to control the testator. *Lewis v. Mason*, 109 Mass., 169. (No discussion of the principle involved and no authorities given.) *Julke v. Adam*, 1 Redf., 454. (Made by a legatee of two-thirds of the entire property, being the widow of testator, in conjunction with other evidence of a dominating influence exercised by her.) *Schock v. Schock*, 27 Ohio C. C., 828. (Made by wife of a beneficiary prior to death of testatrix, the wife not being a party to the suit, and received in connection with proof of her actions tending to show ill-will toward testatrix and a design to induce a favorable will by feigning kindness and affection.) *Brush v. Holland*, 3 Bradf., 240. (Made by a legatee, executrix, and propounder.)”

Examining *Lewis v. Mason*, referred to in the foregoing note, we find the rule stated in this language:

“On an issue whether a will was executed under undue influence of some of the testator’s children, their statements made

in the testator's lifetime to another child, that he should not stay in the testator's house and that they had got the testator where they wanted him, are admissible in evidence."

And in *Julke v. Adam*, on the same subject, the court says at page 460:

"This testimony, as to the language and declaration of a person against whom undue influence is charged, was taken subject to objection; but I admitted it all, as it is clearly competent showing declarations of a person so situated, so far as they tend to prove an existing intent and disposition."

And in *Brush v. Holland*, at 243, the court says:

"There is a point of view still in which the proposed evidence may be admissible when a party is accused of having effectuated a certain act by undue means, if the facts show an opportunity for the accomplishment, I can not say that the predisposition of the party to produce that precise result is immaterial, or that his declarations evincing his intention are incompetent evidence."

It is true that the declarant, in *Schock v. Schock*, *supra*, was not a beneficiary, but the principle is the same and this is shown by its collation in 38 L. R. A. (N.S.), *supra*, with cases in which the declarants were beneficiaries, while *Thompson v. Thompson*, *supra*, is cited as supporting the general rule to which declarations showing "intent or disposition" form an exception.

It is the opinion of the court that the declarations of Edna admitted in evidence were not admissions and incompetent under the rule laid down in *Thompson v. Thompson*, but were declarations of her intent and disposition and competent evidence to prove her intent and disposition under the rule laid down in *Schock v. Schock*, and the other cases heretofore cited on that subject.

Lastly, it is objected that the court erred in overruling the motion of the defendant to strike out the answer of the witness, Rolling, as to his opinion of the mental condition of the decedent. The witness was asked this question:

"Q. During the time you knew him, was he, in your opinion, of sound or unsound mind?"

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The witness answered:

“A. Well, I never did think he was of sound mind the way he used to carry on.”

The ground of the objection is based on the case of *Runyan v. Price*, 15 Ohio State, 1. In that case a witness was asked:

“Q. State what your opinion was, on the evening Bowen called upon you to witness the will, as to the sanity or insanity of William Runyan, or his capacity to make a will?”

The court sustained the objection to this question, and the supreme court affirmed the trial court, saying at pages 13 and 14::

“In the first place it sought the opinion of the witness, not at the time of the delivery of his testimony, but the opinion he had entertained several years before, and which subsequent consideration and reflection may have satisfied him was erroneous. This was on the examination, in chief, by the party, of his own witness. As well might he have claimed to prove the occurrence of facts by interrogating witness as to his understanding or recollection, in regard to them years before, instead of at the time of his examination.”

The situation before the court is not the same as it was in *Runyan v. Price*. The question propounded to the witness in this case called for his present opinion. Whether, under such circumstances, where the question is in the present tense and the answer is in the past tense and the court overrules a motion to strike the answer out, error is committed, and whether that error is prejudicial, the court does not stop to inquire, for the reason that in the opinion of the court the answer of the witness is not open to the objection that it merely states an opinion which was entertained at a past time. The language of the answer is, “I never did think he was of sound mind.” The dictionaries define the word “never” as follows: “Not ever; at no time, whether past, present or future.” As the court construes the answer of the witness, he was giving his present opinion, and therefore it is unobjectionable under the rule laid down in *Runyan v. Price*. In *Dunlap v. Dunlap*, 89 O. S., 28, at

32, the Supreme Court says that, in any event, an error, if any, such as the one here under discussion, is not of such substantial and prejudicial nature as to warrant the setting aside of a verdict.

The evidence in this case was conflicting. Witnesses testified to facts and circumstances tending to show testamentary incapacity, and various witnesses gave their opinion that the decedent was mentally unsound. Other witnesses testified in support of the testamentary capacity of the decedent. This mass of conflicting evidence was submitted to the jury and it returned a verdict setting aside the paper writing as a will.

Under the circumstances, it is the opinion of the court that the issue was one pre-eminently for the jury, and inasmuch as in the opinion of the court the issue was properly submitted to it, the motion for a new trial is overruled.

VALIDITY OF ORDINANCE PENALIZING GAMBLING.

Common Pleas Court of Stark County.

NICK MAGRIS V. CITY OF CANTON.

Decided, November 4, 1919.

Constitutional Law—Ordinance Against Gambling is a Valid Exercise of the Police Power—And is Not Rendered Ineffective by Reason of a Statute Covering the Same Subject—Section 3658 Directed Against the Act of Gambling and 3664 Against the Person Engaged in or Permitting Gambling on Premises Under his Control.

1. A judgment will not be reversed in a criminal case because the verdict is contrary to the evidence, unless it is manifestly so.
2. A municipal ordinance making it unlawful to permit a game to be played for gain, upon or by means of any device or machine, in certain specified places of which such person has the care or possession, and providing that one found guilty of a violation thereof shall be fined not less than twenty-five dollars (\$25.00) nor more than two hundred dollars (\$200) is a valid exercise of the police power specifically granted to municipalities in this state under Sections 3658 and 3628, General Code.
3. The Legislature of the state having by Section 3658, General Code, expressly conferred upon a municipality the right to pass an

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ordinance to prevent gambling, the fact that there exists a state law upon the same subject, as by Section 13056, General Code, does not render the ordinance ineffective or invalid.

4. The provisions of Section 3665, General Code, declare what punishment may be inflicted for offenses specified in Section 3664, General Code, but the offense of gambling or operating a gambling house is not one of the offenses specifically mentioned in Section 3664, General Code, and, therefore, Section 3665, General Code, does not determine the limit of punishment that may be inflicted in such a case; but such a case comes within the provisions of Sections 3658, General Code and 3628, General Code.

McCall & Abt, for plaintiff in error.

Clarence A. Fisher, City Solicitor, and *James E. Kinnison, Ass't Solicitor*, contra.

DAY, J.

This is a proceeding in error, brought to reverse the criminal court of the city of Canton. The plaintiff in error was charged in the court below with a violation of Section 3 of Ordinance 4059 of the city of Canton, said section providing that—

“Whoever, in the city of Canton, permits a game to be played for gain upon or by means of a device or machine in his house or in an outhouse, booth, arbor or erection, of which he has the care or possession, shall be fined not less than \$25, nor more than \$200.”

The affidavit filed in the court below is in the following language:

“That on or about the 26th day of August, 1919, at the city of Canton, in the said county of Stark, one Nick Magris did unlawfully permit a certain game, the name of which is to affiant unknown, to be played for gain, to-wit, money, by means of a certain gaming device, to-wit, a deck of cards, by certain persons, whose names are to affiant unknown, in a certain house and erection of him, the said Nick Magris, the said house and erection being then and there in the care and possession of him, the said Nick Magris, contrary to the form of an ordinance of said city in such cases made and provided, and further deponent says not.”

The defendant plead not guilty and trial was had before the criminal court and the defendant found guilty. It is to reverse

this finding that this proceeding is prosecuted. The usual methods of saving the questions complained of were pursued in the court below, by objection to the introduction of testimony, a motion to quash the affidavit and a motion at the close of the city's case, as well as at the close of the entire testimony, and a motion for new trial, all of which were held adversely to the plaintiff in error.

The errors complained of may be grouped under two general heads; first, is the judgment of the court below against the manifest weight of the evidence; and second, did the court err in refusing to quash the affidavit, "for the reason that the same is invalid and void because the city council of the city of Canton, Ohio, has no power to enact a law, except such as is given it by statute, and that it has exceeded its authority under Section 3665 in this, to-wit: that it has placed a penalty on said offense greater than fifty dollars; and second, in this, to-wit: that the offense in said ordinance is an offense under the state law, and one which the city council has no authority to enact."

A brief review of the testimony upon which the city relied for conviction as to so much of the affidavit as charges the defendant below with permitting games, etc., by divers persons, whose names are to affiant unknown, "in his certain house and erection of him, the said Nick Magris, the said house and erection being then and there in the care and possession of him, the said Nick Magris," raises the question: did the testimony introduced by the city in the court below justify a finding of guilty? Or, in other words, was the judgment of the court below, finding him guilty, against the manifest weight of the evidence upon that feature of the affidavit?

The rule with reference to the duties of a reviewing court reversing a lower court, or a court setting aside the verdict of a jury upon the question of the weight of the evidence, in Ohio may be stated as follows:

Commenting on the conflict of evidence in a criminal case, Judge Peck in *Breece v. State*, 12 O. S., 146-156, said:

"The jury who try a cause and the court before which it is tried, have much better opportunities to determine the credibility and effect of the testimony, and we ought therefore, to hesitate before disturbing a verdict rendered by a jury and con-

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firmed by a court, possessing such advantages, merely because there is an apparent conflict in the testimony."

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And the court in that case, held that—

"A judgment will not be reversed because the verdict is contrary to the evidence, unless it is manifestly so, and the reviewing court will always hesitate to do so where the doubts of its propriety arise out of a conflict in oral testimony."

"Applying the rule of law above stated to the evidence presented in this case, we find no sufficient ground to warrant us interfering with the verdict rendered."

The Court of Appeals of this district laid down the rule for disturbing verdicts in a criminal case, in *Andy v. The State*, found in 19 C. C. (N. S.), 93 and 94:

"And as a reviewing court, keeping in mind the rule that the verdict of the jury should not be set aside unless it is manifestly against the weight of the evidence, we are of the opinion that the record presents a case which does not require this court to interfere with the verdict of the jury on the ground stated."

The court trying the case has the very great advantage of seeing the witnesses, hearing their testimony, observing their demeanor and reaching a conclusion upon not only the spoken words of the witness, but his manner of testifying, his appearance and his general conduct, all of which aid the court in reaching a conclusion as to what weight should be given his testimony.

Now, the rule in a criminal case is that the evidence should satisfy the mind of the trier with the guilt of the accused beyond a reasonable doubt before a judgment or verdict so finding could be lawfully rendered. The Supreme Court of Ohio has held that in human affairs absolute certainty is not always attainable and from the nature of things, reasonable certainty is all that can be attained upon many subjects. When a full and fair consideration of all the evidence satisfies the mind to a reasonable certainty of the guilt of the accused, it is the duty of the court to so find. Of course, whenever there is only a strong probability of the guilt of the accused, it is the duty of the court to acquit.

Now, as a reviewing court, how stands this record? Are we justified in finding that the judgment of the court below was manifestly against the weight of the evidence? The affidavit

charged the man with permitting this gambling in a certain house of which he had the care and possession. The record discloses that two of the city's witnesses testified that the defendant said to them that he was the proprietor of the premises. One of them puts it in a somewhat qualified way by saying that that was his understanding, etc., that the defendant was the proprietor in charge. Corroborative of this was the fact that the defendant was in the actual physical possession of the ground floor of the building and was a member of the organization to which he claims to have sublet these premises, that he was in the physical presence of those who were engaged in gambling and on the premises wherein this gambling was being carried on. He claims to have sold these fixtures and sublet any rights that he had in these premises and that a club, of which he was a member but not an officer, was conducting this card room.

Now, it appears that he had a chattel mortgage upon these premises by his own story, and a condition in that chattel mortgage justified him in taking physical possession at any time that he found his security in danger. He had more than the interest of a member of the club; he had a possessory right which he could enforce to absolute possession whenever he regarded his security in danger. He is charged with being the one who has the care and possession of these premises. Possession in the law, as the term is used in this ordinance, must mean some right of power or control over the premises for the time being, at least, and to have control of the premises must mean also the right to exercise some power relative thereto; and to have care means substantially the same thing as control, or, at any rate, some right which might be enforceable as to the premises.

Was the conclusion of the court below in finding the defendant guilty manifestly against the weight of the evidence, when we have the testimony of two witnesses for the city who testified to the admission by the defendant that he was the proprietor of the place, and the record disclosing that the defendant was actually upon the premises in person and in the gambling room; that he had, by his own testimony, a possessory right through the terms of his chattel mortgage, which justified him in reducing the same to an absolute possession whenever he deemed his security in danger?

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It is said in an Indiana case that a lessor of a room which was used for gambling, is held to have knowledge of its use under the statute of the state. This man testified that he sublet these premises, and no one can deny but what gambling was going on in this room, that he was physically present and he surely must have seen it.

“It shall be sufficient evidence of the fact that a building or room was rented for the purpose of gaming, if gaming is actually carried on therein with the knowledge of the owner, or under such circumstances that he has good reason to believe that his room is being so used, and takes no reasonable steps to restrain the occupant from continuing the unlawful use. Section 2079, R. S. 1881. Hence direct evidence to prove that there was a specific agreement or intent on the part of the lessor and his lessee at the time he leased the room that it was to be used for the purpose of gaming, if unnecessary.” *Voght v. The State*, 124 Ind., 358.

Applying the rule of reasonable doubt, as defined by our Supreme Court, that absolute certainty is not always attainable, but that reasonable certainty is all that can be attained upon many subjects, and the court below, hearing the different witnesses, seeing the witnesses and observing their conduct, reached the conclusion that the defendant was guilty, is this so manifestly against the weight of the evidence that we can be justified, as a reviewing court, in disturbing its finding? We are constrained to the conclusion that we should not. Hence, the petition in error upon this ground should be overruled.

And this brings us to the second phase of the case, to-wit, whether or not the court below erred in refusing to quash the affidavit; or, in other words, whether or not there is error in the criminal court's conclusion as to the sufficiency of the ordinance and the affidavit drawn thereunder.

It is the contention of the plaintiff in error that this ordinance under which the plaintiff in error is prosecuted is in conflict with Sections 3664 and 3665 of the General Code. An examination of these two sections of the code discloses that a municipality is authorized to provide for punishment, among other things, of a “*gambler*,” and that Section 3664 provides for punishment for a violation of an ordinance passed in pursuance of its authority,

of a fine which shall not exceed fifty dollars for a single offense. These two sections of the statute are found in the 66th Volume, Ohio Laws, page 183, and were enacted in 1869, and carried into our Revised Statutes, Bates Edition, as Sections 2108 and 2109. In support of the contention of plaintiff in error, we are cited to an opinion of the Circuit Court for Columbiana county, handed down April 10, 1903, wherein a divided court held in substance that a state law having provided for the punishment of assault and battery, a municipality could not punish for the same offense by virtue of Section 2108, R. S., under the powers of Section 1692, R. S. Now, it is to be noted that the case was decided under the law prior to the passing of the municipal code, as found in Volumes 96 Ohio Laws, pages 21 and 22, and 99 Ohio Laws, page 5.

It is the contention of the defendant in error that this ordinance is drawn under Section 3658 of the General Code, and passed by the city council pursuant to Sections 3615, 3616 and 3628 of the General Code. These sections provide in substance, that each municipal corporation shall be a body politic and corporate, and that all municipal corporations shall have the powers mentioned in this chapter, and council may provide by ordinance or resolution for the exercise and enforcement of them; and that the municipality has the right to make the violation of ordinances a misdemeanor and to provide for the punishment thereof by fine or imprisonment or both, but such fine shall not exceed \$500, and such imprisonment shall not exceed six months; and among other rights delegated by the Legislature was the right to pass an ordinance to prevent rioting, *gambling*, noise, disturbance, etc. These sections of the code were adopted in 1902 and 1908, after the decision of the circuit court case from Columbiana county, heretofore referred to.

I think it is conceded that the Legislature can authorize a municipal corporation to prohibit and punish minor offenses which are also punished by state law. *Koch v. State of Ohio*, 53 O. S., page 433. And it is undoubtedly the law that the prohibition of crimes and offenses lies within—

“the domain of the police power; that the exercise of police power is the exclusive prerogative of the state; that a municipal corporation has no inherent power to act by laws or ordinances

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for the punishment of offenses; that it has only such powers as are clearly and expressly conferred upon it by the Legislature, or must necessarily be implied in order to carry into effect those expressly granted; that where the Legislature, by general law, has exercised its jurisdiction as to the punishment of an offense, there is a presumption of an intention to make its jurisdiction over such a subject exclusive, and that in all cases where the grant is uncertain or doubtful, the power must be denied.” 1 C.C.(N.S.), 254 and 255.

Applying that doctrine to the case at bar, does it not appear that the Legislature *clearly* and *expressly* conferred upon the municipality the right to pass an ordinance to prevent *gambling*, by Section 3658; and by Section 3628 the right to provide a punishment therefor, not exceeding a fine of \$500. We are clearly of the opinion that such right has been given and that the city was within its rights in passing the ordinance under and by virtue of Section 3658 General Code.

Now, Section 13056 of the General Code makes having the care or possession of premises wherein gambling is permitted or carried on, an offense, and the language of this ordinance practically carries the language of the General Code into its terms. This does not render the ordinance ineffective, because the Legislature has delegated the power to pass such an ordinance to the municipality, and under the doctrine of the 53rd Ohio State, *supra*, the ordinance does not become invalid because the state has legislated upon the same subject, provided the power to pass ordinances upon the subject has been clearly delegated by the Legislature, as is the case in the present instance.

Let us consider the apparent meaning and intention of the Legislature in making these misdemeanor sections, to-wit, G. C., 3628, 3658, 3664 and 3665. Section 3658 authorizes the municipality to pass an ordinance to prevent *gambling*. That clearly means an intention to make a misdemeanor of the act itself, an attempt to eradicate gambling in a municipality and to prevent it. Now, Section 3664, as amended in Volume 103 Ohio Laws, page 168, authorizes the municipality to pass an ordinance to provide for the punishment of persons disturbing the good order, etc. In like manner, to provide “for the punishment of any * * * *gambler*, etc.” So that it is apparent

that Section 3664 is directed against the person, the individual, rather than against the act itself and an attempt to prevent the furtherance of the act, to-wit, gambling.

My view therefore is that the Legislature delegated the power to the municipality to pass the ordinance, and that Section 3658 is the section wherein the power is especially delegated, and that Section 3628 is the section wherein the Legislature delegated the power to the municipality to fix a penalty not to exceed \$500, or imprisonment not to exceed six months, or both. This view does not conflict with *Morris v. Conneaut*, 20 N.P.(N.S.), 289.

Fully sustaining the conclusion which I have reached is the case of *Sherlock, In re*, 19 N.P.(N.S.), 302, which is directly in point, and which arose out of a prosecution under a municipal ordinance forbidding gambling.

The court in its opinion, on page 304, says:

“The provisions of Section 3665, G. C., declare what punishment may be inflicted for offenses specified in Section 3664, of which the offense in this case is not one, and therefore Section 3665 does not determine the limit of punishment that may be inflicted in this case.

“This case comes within the provisions of Section 3628, G. C., which is as follows:

“ ‘Section 3628. To make the violation of ordinances a misdemeanor, and to provide for the punishment thereof by fine or imprisonment, or both, but such fine shall not exceed five hundred dollars and such imprisonment shall not exceed six months.’

“It is apparent, therefore, that the penalty section of said ordinance is clearly within the limit prescribed by said Section 3628.”

My conclusion is that the court below did not err in overruling the motion to quash the affidavit or in declining to suspend its judgment by reason of the unconstitutionality or illegality of the ordinance under which the affidavit was drawn. Being of this opinion, the second ground of the petition in error must be denied.

The judgment of the court is that the application of the plaintiff in error for a reversal of the court below must be denied on both grounds.

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**RECOVERY FROM ADMINISTRATOR NOT BARRED BY DELAY
CAUSED BY DILATORY COURT PROCEEDINGS.**

Court of Common Pleas of Montgomery County.

LAURA H. GEMIN v. C. W. SALISBURY, AS ADMINISTRATOR, ETC.*

Decided, June 8, 1918.

Estates of Decedents—Money Placed in Trust in Payment for Services—Trust Declared Incomplete—Subsequent Action for Recovery on Promise of Payment—Statute of Limitations Not a Bar Thereto, When—"New" Assets Not Mentioned in the Ohio, which is Given a Broader Interpretation on Account of that Fact.

The beneficiary of a trust fund—created by a decedent in payment for care and services, but which went back into the estate because of failure of the decedent to complete the trust—is not barred by the statute of limitations from maintaining a suit against the administrator on the promise of payment for the services, either by the lapse of more than eighteen months from the date of giving bond by the administrator or the period fixed by the two years' statute, where it appears that demand was made upon the trustee for the fund soon after the death of the decedent, but the trustee insisted in testing the validity of the trust and by reason of dilatory action on his part and that of the administrator a decision adverse to the claim of the beneficiary was not entered for almost three years after the death of the decedent.

Murphy, Elliff & Leen, for plaintiff.

Powell & Howell and E. T. & W. B. Turner, contra.

PATTERSON, J.

In this case a jury was waived and the case tried to the court upon its merits. Plaintiff has filed a petition and a first and second amendment to the petition. Defendant has filed an answer and an amended answer.

Plaintiff, in her original petition, seeks to recover \$2,000 with interest at six per cent. from the first day of July, 1911,

*Affirmed by the Court of Appeals, July 1, 1919.

upon a verified accout for services rendered to one James A. Salisbury, deceased, during his lifetime, by plaintiff at the request of said James A. Salisbury and upon his promise to pay for the same.

To this petition defendant has filed a denial, in which he denies that there is due and ownig to plaintiff from the estate of said James A. Salisbury the sum of \$2,000 or any other sum of money whatever; and further denies that plaintiff herein rendered any services to the said James A. Salisbury, deceased, and denies that the said James A. Salisbury promised to pay the plaintiff herein for the services alleged to have been rendered; and avers that the decedent was at plaintiff's house at intervals for short periods of time and avers that for the time spent in the household of plaintiff herein she was duly paid; admits that the plaintiff herein furnished to said decedent at times board and lodging, but believes and therefore avers that said plaintiff was paid for all board and lodging given said James A. Salisbury, deceased; denies that the plaintiff nursed the decedent or did his laundry work during said period of time; and denies that she cared for him in any way; and further denies each and every other allegation of the petition.

For his second defense, defendant avers that he was duly appointed and qualified as administrator with the will annexed of the estate of James A. Salisbury, deceased, on the 3d day of June, 1913, and on that date his bond as such administrator was filed and approved by the court; that the plaintiff herein failed to file her account with said defendant either for allowance or rejection until the 23d day of November, 1915, and that said claim was rejected on the 14th day of December, 1915, by said administrator, and this action was brought upon the 6th day of January, 1916; that because of said facts the said plaintiff herein has failed to bring her action within the time allowed by Section 10746 of the General Code of Ohio, that is, within eighteen months from the date of the giving of the bond by the administrator; nor has said plaintiff herein brought her action within the time set forth in Section 10746 of the General

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Code providing that an action shall be brought within two years of the date of the giving of the bond of the administrator; that by reason of the foregoing facts the right of action of the plaintiff, if any she has, is barred.

Plaintiff, in her amended petition, adopts all the allegations set forth in her original petition and says defendant was appointed and qualified as administrator as set forth in his answer; that her claim was presented for allowance and the same rejected; and that at the time this action was begun said estate of decedent was not administered.

Plaintiff further says that on or about the first day of December, 1911, said decedent promised to pay for said services the sum of \$2,000, and covenanted and agreed to create a valid trust for the payment to her at his death of said amount by placing the sum of \$2,000 in the hands of Ben B. Schieble upon trust to have and hold the same for the sole use and benefit of this plaintiff during the lifetime of said James A. Salisbury and at his death to pay the same over to plaintiff; that plaintiff agreed then and there to accept said trust in her favor upon above terms in full settlement; that thereafter in December, 1911, said James A. Salisbury, pursuant to said covenants and agreements, paid over to said Ben B. Schieble said sum of \$2,000 to have the same and hold the same, as then represented by decedent to this plaintiff, upon trust as aforesaid for the sole use and benefit of plaintiff. Plaintiff further alleges that, relying upon the statements of deceased that the said Ben B. Schieble held said money upon a valid trust for her sole use and benefit, she agreed to accept the same in full settlement; that upon the death of said decedent, plaintiff demanded payment to her from Ben B. Schieble of said fund pursuant to said trust; that thereupon Ben B. Schieble refused to pay same and brought an action against the plaintiff and the estate of decedent in the common pleas court of Montgomery county, Ohio, for a construction by the court of said trust and the direction of said court as to the disposition of the money so held by him thereunder; that said court held that said trust was not a valid trust in that same had not been fully completed by James A. Salis-

bury during his lifetime, and ordered and directed said Ben B. Schieble to pay the same unto this defendant as administrator of the estate of said James A. Salisbury; that said decision and order by the common pleas court were affirmed by the court of appeals on or about January 2, 1916.

Plaintiff further alleges that she relied upon the promises of deceased and his statements that a valid trust as aforesaid in her favor had been created, and, so believing and trusting, she could not conscientiously sooner swear to the account herein sued on or make claim against said estate for same for the reason that she believed said trust in her favor to be in full force and effect and had accepted the same in payment of all her claims; that she had no knowledge of the invalidity of said trust until so finally declared by the court of appeals.

Plaintiff further alleges that said James A. Salisbury falsely represented to her that he had created a valid trust as aforesaid in her favor, well knowing that said representations were untrue, and that the same were made with the intent to deceive and defraud this plaintiff. Plaintiff alleges that said representations were false and then known to the decedent to be untrue, in that he did not complete a trust as he had represented.

Plaintiff further alleges that said James A. Salisbury falsely invalidty of the same until so decided by the court at the instance of said trustee; that her failure to swear to her claim and present same for allowance to the administrator of said estate and bring suit thereon was because she relied upon and believed the false and fraudulent representations of said decedent, and plaintiff had no knowledge of and did not discover the fraud practiced upon her until the decision of the said Schieble suit was rendered January 2, 1916; that this plaintiff and this defendant were the sole and only contestants of said cause No. 35754. Wherefore plaintiff asks for judgment as in her petition.

To this amended petition the defendant has filed an amended answer in which he refers to and adopts every allegation set forth in the original answer filed herein, and further alleges more in detail the appointment of defendant as administrator

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and the dates of the publication of his notice of appointment; that since said appointment defendant has at all times resided in the city of Dayton, Montgomery county, Ohio, and that no assets have come into his possession as said administrator save and except such assets as came into his possession at the time that he qualified as administrator aforesaid on the 3d day of June, 1913; that plaintiff was a resident of Dayton at the time said James A. Salisbury died and knew of his death; that plaintiff had personal knowledge of defendant's appointment and qualification at the time of the appointment and qualification; that the cause of action of plaintiff accrued on the 28th day of March, 1913.

Defendant further alleges in detail the presentation for allowance of the claim of plaintiff; that suit thereon was not commenced until more than eighteen months after the appointment and qualification and until more than eighteen months after the defendant gave bond as such administrator, nor within two years of the appointment, qualification and giving bond. Defendant further says that the right to sue this defendant as administrator at the time the petition herein was filed was and still is barred by the statute of limitations, which defendant pleads and relies upon as a bar to plaintiff's right to recover herein.

Wherefore defendant denies each and every allegation contained in the amendment to the petition and prays that the petition and amendment to the petition filed herein may be dismissed at the cost of the plaintiff.

Plaintiff, in her second amendment to the petition, adopts and makes a part thereof all the allegations set forth in the petition and the first amendment thereto as though fully set forth. Plaintiff further says that neither at the time said claim was presented for allowance, nor at the time same was rejected by defendant, nor at the time this action was begun had said estate been declared insolvent or referred under Section 10722 of the General Code.

Plaintiff further says that said sum of \$2,000 held by said Ben B. Schieble was at the time of the trial of this cause, but

not until after eighteen months from the date of the appointment of defendant as administrator, in the hands of this defendant as such administrator, paid to him by said Ben B. Schieble under orders of the court in said cause No. 35754 on the dockets of this court, entitled Schieble against Salisbury, administrator; that prior to January 2, 1916, said fund was in the hands and manual possession of Ben B. Schieble, and was not caused to be appraised by said defendant by the appraisers of the personal estate and was not so appraised as assets at the time this case was begun, and was at the time this case was begun a new asset in the hands of said defendant.

Plaintiff further alleges that said cause aforesaid No. 35754 was not tried on the merits of this cause, nor were the issues raised as aforesaid shown; that said Schieble by his pleading and testimony in said case absolutely maintained that he was holding said fund for the use and benefit of this plaintiff and continuously did so until ordered otherwise by the final decision of the court; that the reason said Schieble refused to pay same to plaintiff prior to the time suit was begun was because ordered not to do so by defendant or his attorneys.

Wherefore, plaintiff prays judgment against defendant for the amount of her claim, and that the defendant be ordered to pay the same out of said funds of the estate in his hands applicable to same, and for all other and further relief to which in law and equity she may be entitled.

These pleadings, in substance, set out the respective claims of the parties hereto. For the purposes of this decision, some brief reference should be made to the facts as shown upon the hearing of this cause. It developed in the testimony that on or about July, 1910, the decedent entered the home of plaintiff as a roomer and boarder, and continued to reside there until about the first of July, 1911; that during the early part of his residence with the plaintiff, it was understood between decedent and plaintiff that a sum of money amounting to \$5,000 would be furnished by him for the purpose of purchasing or building a home for their occupancy and which should be hers at his death; that this was to be in full payment for any and all

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services she might render to him. The testimony shows that the decedent did reside in the home of plaintiff practically all of the time from July, 1910, to July, 1911, and that he was more than a roomer and boarder—that he was also what might be considered a patient. Decedent during all that time was in bad physical condition, and the care of him by plaintiff was very laborious in its nature and was almost of the character of care which would be required by an infant, because his physical condition had left him paralyzed from his waist down, and he was unable at times to control his bowels, which necessitated very disagreeable labor on the part of plaintiff and her husband; that some time subsequent to the above arrangement in reference to the purchasing of a new home, on account of some difficulties in decedent's home, a different arrangement was entered into, whereby it was agreed between the decedent and plaintiff that \$2,000 of the \$5,000 should be set aside in full payment of her services and held in trust by one Ben B. Schieble to be paid to her at decedent's death; that in the early part of September, 1911, the sum of \$2,000, which was the amount agreed upon between the decedent and the plaintiff as a reasonable compensation for her services, was placed in the hands of said Schieble to be held by him in trust for her and to be paid to her at decedent's death; that said Schieble accepted said money with a full understanding of the conditions under which he accepted the same; and subsequently, in order that the money might earn some income, he loaned the same to Baker & Brother; that while said Schieble held said money and before the death of decedent a number of conversations and conferences were had by Schieble and the decedent relative to said \$2,000, and in none of these conversations did the decedent deny the purpose for which Schieble held said money, and as a further indication of the perfect understanding between decedent and Schieble, it might be mentioned that when the first year's interest became due on said loan to Baker & Brother that the decedent requested of Schieble that the interest be paid to him, but Schieble refused to do so until the decedent first obtained the consent of plaintiff; that the decedent did obtain

the consent of plaintiff and thereafter did receive the interest from Schieble. From all the testimony in the case, the court can not recall any that throws any doubt upon the claim of plaintiff that Schieble held this money in trust for her and that it was to be paid to her at decedent's death for full compensation for the services which she had rendered him.

Subsequently, the decedent, while in Florida, upon the request of Schieble, who, while not doubting how he held the said money, but in order to have some written recognition of the capacity in which he held the same, requested decedent to give him such a written memorandum, which the decedent did. And it was this letter written by decedent in Florida which formed the basis of the conclusions of the court of common pleas and the court of appeals that said Schieble did not in fact hold the money in trust for plaintiff but held it in trust for the decedent.

Shortly subsequent to the death of the decedent, plaintiff made a demand upon Schieble for said money, which he refused to pay on account of being uncertain, since the receipt of said letter, as to the capacity in which he held the said money, and about the same time the defendant made a similar request of Schieble to pay the money to him as administrator, which Schieble refused to do. Shortly thereafter a suit was begun in the common pleas court of this county to determine the nature of the trust, which suit, after the court had decided as above indicated, was taken to the court of appeals by said Schieble and the plaintiff and there affirmed. In the petition in the trust case, Schieble was the plaintiff, and this plaintiff and this defendant were the defendants. On the appeal to the court of appeals, Schieble and this plaintiff were plaintiffs, and this defendant was the defendant.

Up until the time that the court of appeals decided the trust case, no claim had been presented to the defendant by this plaintiff for her services, and pending the action upon the trust case and its final disposition in the court of appeals, the time for the presentation of claims to estates and suits thereon, as provided for in Section 10746, had expired.

As we understand the final claims of plaintiff, she seeks re-

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covery because of the alleged fraud committed upon her by the decedent on account of which she has an equitable lien upon the said \$2,000 as a fund in the hands of the defendant, and because the \$2,000 coming into the hands of the defendant as administrator under all the circumstances herein set forth, constituted new assets in his hands, and by favor of Section 10747 the statute of limitations against the presentation of her claim did not begin to run until said new assets had in fact come into his hands.

The claims of the defendant are three-fold. First, that the defendant is not indebted to plaintiff in any amount whatever, and that whatever services she performed for decedent were compensated during his lifetime. Second, that because plaintiff did not present her claim for allowance nor bring suit thereon within the time prescribed in Section 10746, that she is barred from recovery. Third, that because the court of common pleas and the court of appeals found in the trust suit that said Schieble held said \$2,000 in trust for the decedent, that at the time of his death they were in fact assets of the estate and can not now be considered as new assets.

Very voluminous briefs have been filed by both the plaintiff and defendant in this case which somewhat remind the court of target practice in their efforts to hit the core of this controversy. For the purposes of this decision, the court will only consider one question raised by the pleadings, and that is, whether or not the \$2,000, in the manner in which it came into the hands of the defendant, is or is not in fact new assets.

Defendant claims that plaintiff slept upon her rights in not presenting her claim for allowance and in the event of its rejection bringing suit thereon within the time prescribed by law. And this brings us to a consideration of what part, if any, the trust suit plays in the determination of the question here involved. As already indicated, the trust suit was begun by Schieble himself against this plaintiff and this defendant in the court of common pleas. At the time the trust suits was begun there was an honest difference of opinion between the parties to the trust action as to the capacity in which Schieble held the trust

fund. While Schieble apparently was confident that he held the same in the same capacity as obtained at the time the \$2,000 was originally placed in his hands, yet he was doubtful as to his right to pay the same over to plaintiff on account of the demand made for payment to him by defendant in this case. Following the decision of the court of Common pleas in the trust suit, the same was appealed to the court of appeals by Schieble and this plaintiff, and it was pending the final determination of this trust suit that the time set out in the statute of limitations as above referred to expired.

The petition in the trust suit was filed on the 16th of June, 1913, and the answer day was July 19, 1913. The transcript of the docket and journal entries in that suit discloses that this defendant did not file his answer when the same was due, nor did he open default until November 17, 1913, at which time he obtained leave to plead in two weeks; that he did not file his answer within that time, nor did he file it until April 4, 1914, when he again opened default with leave to file the same. So that practically eight months and a half expired before this defendant filed his answer in the trust suit, and even then the same was not heard by the court of common pleas and decided until the 27th of May, 1915. So when defendant raises the claim in this case that plaintiff slept upon her rights, it is apparent that defendant was enjoying somewhat of a slumber party himself.

Counsel for defendant, in their contention that this \$2,000 does not constitute new assets in the hands of the defendant, rely principally upon the decisions of the Supreme Court of Massachusetts and the statute of that state, which they claim to be identical with the statute in his state. They rely also to some extent upon the case of *Favorite v. Booher's, Administrator*, 17 Ohio State, p. 548, and upon this claim they base two propositions; first, that the statute of limitations runs even against a minor's action; and, second, that money arising from the sale of land possessed by the decedent at the time of his death are not new assets. We have no inclination to controvert this authority, but doubt its application to the issue raised in this case.

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Counsel for the defendant seem to insist that the question of what constitute new assets has been definitely and forever determined by the Supreme Court of Massachusetts. To this conclusion we can not agree. Every case cited from Massachusetts by counsel for defendant can be distinguished from this case. And the opinions of Justice Holmes of the Supreme Court of Massachusetts, upon whom counsel for defendant rely so strongly, do not say that what do and do not constitute new assets has been finally determined. To quote from his opinion in the case of *Fay v. Haskell*, 207 Mass., p. 207, at the bottom of p. 215, it reads as follows:

“The phrase ‘new assets’ occurring in statutes relating to solvent estates has received much more attention. Property recovered by an administrator which was fraudulently conveyed by the intestate has been regarded as new assets. (*Holland v. Cruft*, 20 Pick., 321; *Welsh v. Welsh*, 105 Mass., 229.) And so as to a reversionary interest in property conveyed to trustees for the benefit of creditors, which at the time of the debtor’s death and long afterwards was supposed to be of no value, and although known to the administrator is not included in the inventory of the estate, but which after eleven years turns out to be more than sufficient to pay the debtor’s claim. (*Quinch v. Quinch*, 167 Mass., 536.) In this case Holmes, J., says that the section of the public statutes (then Pub. Sts. v. 136, pag. 11, now R. L. C. 141, par. 11) ‘is a difficult one to construe. It can not be taken to extend to all cases where tangible property first is received by the executor or administrator after two years, even if not included in the inventory. * * * But, on the other hand, the section must be given a serious meaning, and it would be made almost illusory if construed not to apply to any case where the right was vested at the debtor’s death.’ (See also *Copeland v. Fifield*, 180 Mass., 223.)”

In none of the cases cited from Massachusetts are there a set of circumstances that even approach a parallel to the facts and circumstances in this case. It is true that the defendant in his inventory did include the note of Baker & Brother, but it is also true that no appraisal was had of the same. And if the defendant was diligent, as an administrator should be, and through

his diligence he learned that Schieble held money in trust or its equivalent and that the same should be turned over to the defendant to become part of the assets of the estate he was administering, by the same diligence he should also have learned that the said note of Baker & Brother was secured by ample security even though the makers of the note may not have been themselves solvent, and should, therefore, have been appraised. It is, therefore, apparent to this court that the defendant in this case entertained the same dubious attitude respecting his right to administer this \$2,000 as a part of the estate as did Schieble with respect to the capacity in which he held the \$2,000 or its equivalent.

In addition to the foregoing, we are of the opinion that there is a clear distinction between the Massachusetts statute and the Ohio Statute. The Massachusetts statute speaks of new assets coming into the estate, while the Ohio statute speaks only of assets coming into the estate. We feel that there is some significance that should be attached to the adjective "new," and on account of the absence of this in the Ohio statute we feel that our law should receive a broader interpretation, particularly under all the facts and circumstances of this case, than the Massachusetts statute.

Therefore, considering all the facts and circumstances in this case and after a careful reading and consideration of all the authorities cited by counsel, this court is of the opinion that the justice of this case speaks most loudly in favor of the claim of plaintiff. The estate is still unadministered, and the same is in no way more inconvenienced than it would have been had the claim of plaintiff been filed and suit brought thereon within the time contended for by counsel for defendant.

In the trial of this case no direct testimony was offered by defendant which in any way controverted the claim of the plaintiff or indicates that it was excessive or unreasonable. And, again, after canvassing all the facts and circumstances and giving a careful consideration of the law cited, the conscience of this court will not permit it to say that the claim of the plaintiff is not just and that she is not entitled to recover. It will be our

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holding, therefore, that the plaintiff recover of defendant the sum of \$2,000 with interest thereon as prayed for in her petition and amendments to the petition.

Exceptions noted.

LIABILITY FOR INJURY CAUSED BY A DOG.

Common Pleas Court of Hamilton County.

FRANCIS VONROHR, BY HENRY VONROHR, HIS NEXT FRIEND, v.
MEYER SILVERGLADE.

Decided, December 1, 1919.

Construction of Section 5838—Making the Owner of a Dog Liable for Injury Caused by It—Bites Inflicted by a Dog not the Only Injury for which Liability is Created.

An allegation that a dog, as was his habit, ran into the road directly in front of the automobile which was being driven by plaintiff, and to avoid hitting him plaintiff made a turn but the dog continued in front of the machine in such a position that one of the front wheels struck him, throwing the machine out of control and causing it to run against a tree, resulting in severe injury to the plaintiff, states a cause of action and the petition is not open to demurrer.

Cohen, Mack & Hurtig, and Philip and S. C. Roettinger, for the demurrer.

Wm. R. Collins, contra.

DARBY, J.

The defendant demurs to the petition for the reason that the same does not state facts which show a cause of action against him.

Briefly stated the petition sets forth, that plaintiff was driving an automobile along a road at a moderate rate of speed, and that when nearing the residence of the defendant—

“cut off the gas and spark from the said automobile, and when he had reached the driveway leading to the defendant’s residence,

* * * a known vicious and dangerous dog, owned by the defendant and harbored by him, which habitually ran after automobiles passing along the said Reilly road, ran out of said driveway into and upon said Reilly road directly in front of said automobile. To avoid hitting and running over the said dog, the plaintiff made a turn to get out of his way, but the dog continued in front of said automobile in such a position that plaintiff struck the said dog with the front wheel of said automobile, without any fault on his part and without any negligence on his part, throwing the said automobile out of control, and causing it to run into a tree on the north side of the said Reilly road, and the plaintiff was thrown with great force and violence against the top and wind shield of said machine and rendered unconscious."

The plaintiff claimed in argument that his action is justified by Section 5838, General Code, which is in the chapter on animals, under the head of "Dogs." The entire section is as follows:

"A dog that chases, worries, injures or kills a sheep, lamb, goat, kid, domestic fowl, domestic animal, or person, can be killed at any time or place; and, if in attempting to kill such dog running at large a person wounds it, he shall not be liable to prosecution under the penal laws which punish cruelty to animals. The owner or harbinger of such dog shall be liable to a person damaged for the injury done."

The defendant claims that this section does not apply to a case of this kind. The history of the section shows that it was passed in the first place to protect animals, and it was not until 94 Ohio Laws, 118, that the word "person" appears in the section.

The so-called "dog bite" cases under this section are familiar. It has been held that this section being in derogation of the common law, must be strictly construed. *Kleybolte v. Buffon, a minor*, 89 O. S., 61. On page 66 of the opinion in that case, the court say:

"The statute which we have quoted is in derogation of the common law, in that it dispenses with *scienter*. The court can not read into it anything which does not come within the clear meaning of the language used, and the statute should not be given force beyond its plain terms. It is provided that the owner of the dog which inflicts the injury shall be liable to the person dam-

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aged to the full amount of the injury done. If it had been intended that the injured party should have the right to recover exemplary or punitive damages, or any damages other than actual damages, the Legislature would have made such a provision."

For the purposes of this case the statute may be considered as though it read as follows:

A dog that injures a person can be killed, etc. The owner of such dog shall be liable to a person damaged for the injury done.

It will hardly be claimed that if a dog injures a person by jumping upon him and throwing him down, and throwing its body upon the person, the owner would not be liable under this section.

The statute does not undertake to define the manner of the injury; but whether the injury is by biting, or in any other form, the statute seems to allow an action against the owner.

In support of the petition, the plaintiff cites *Tasker v. Avey*, 96 Atl., 737. The statute of Maine provided as follows:

"When a dog does damage to a person or his property, his owner or keeper, * * * forfeits to the person injured the amount of the damage done, provided the said damage was not occasioned through the fault of the person injured; to be recovered by an action of trespass."

This statute seems to be in substance the same as the Ohio section quoted, except that the person is ahead of the property.

The facts of the case were that the plaintiff was driving along the highway in the exercise of reasonable care and the defendant's dog suddenly—

"Jumped directly in front of my machine, and so quick, I did not have time to apply the brakes before it struck him. The left-hand wheel struck him and jacked the machine around across the ditch, blown out of the solid ledge, and tipped it over."

The Supreme Court sustained a verdict for the plaintiff upon this state of facts under the law as above quoted.

Williams v. Brennan, 213 Mass., 28, is a similar case. The statute provided—

"The owner or keeper of a dog shall be liable in an action of tort to a person injured by it in double the amount of damages sustained by him."

The syllabus is as follows:

"If the act of a dog causes an automobile to skid from the right-hand side of a public way and to go directly in front of a horse that is being driven slowly in the opposite direction on the other side of the way, whereupon the horse rears and descends upon the top of the automobile, injuring it, in an action by the owner of the automobile against the owner of the dog under R. L., chap. 102, Section 146, for double the amount of the damages thus sustained, the jury is warranted in finding that the dog was the sole, direct and proximate cause of the injury."

It was suggested in argument that the petition shows that the act of the dog was not the proximate cause of the injury, and therefore that the petition is demurrable. This is too narrow a construction of the petition.

The allegation is that the dog as was his habit ran into the road directly in front of the automobile, and that to avoid hitting him, the plaintiff made a turn to get out of his way, "but the dog continued in front of said automobile in such a position that plaintiff struck the said dog with the front wheel of said automobile * * * throwing the said automobile out of control and causing it to run into a tree, etc."

The dog persisted in its action and caused the plaintiff to strike it, bringing about the accident.

It was within the power of the Legislature to make the owner of the dog liable for injury to persons, and the court is of the opinion that by that section it has provided for just such a case as this.

Upon this construction of the statute, and by the authorities above referred to, the demurrer is overruled.

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Tappmeyer v. Journal-Republican.

**EXAGGERATION WHEN INTENDED TO AMUSE IS
NOT LIBELOUS.**

Common Pleas Court of Clinton County.

FRED TAPPMAYER V. JOURNAL-REPUBLICAN CO.*

Decided, December, 1919.

Libel—Article Complained of Must be Considered as a Whole—Segregated Words and Phrases Not Determinative—Gross Exaggeration Not Libelous Where Not Intended to be Accepted Literally.

1. A newspaper article claimed to be libelous should be considered as a whole in determining its import, character, and the meaning readers are likely to attach to it, and not segregated parts thereof.
2. There is a well known type of literature wherein gross exaggeration is resorted to in order to amuse and attract, and in such articles words that would be libelous *per se* under ordinary conditions are not so libelous, if the article taken as a whole is such as no one would be expected to accept it literally.
3. In such an article it is not libelous *per se*, nor does it impute treason, to refer to one as a "hyphenated citizen," or "also from der Vaterland," when the import of the article clearly shows that the words used were intended to describe the person to whom they were applied as one from Germany, or of German descent.
4. It is not libelous, *per se*, to publish of another that "he has not broken down and wept tears of repentance for having decided to litter up his premises with corpses," or that some one would serve "as a target for bullet holes from the owner's musket," when the import of the article shows it to have been so gross an exaggeration as to prevent its being believed by any one.

*Miller & Foster and Hubbard Schwartz, attorneys for plaintiff.
Smith, Rogers & Smith, Doan & Cartwright and G. P. Thorpe,
attorneys for defendant.*

Heard on motion for directed verdict.

Upon the trial of this cause no proof was offered of malice and no special damages were claimed. At the conclusion of

* Affirmed by the Court of Appeals for "the reasons stated in the opinion of the trial court."

plaintiff's case, the defendant moved for a directed verdict for the defendant. It was conceded by counsel on both sides that unless the article complained of was libelous *per se*, the motion would have to be sustained. After exhaustive argument the court delivered the following decision on the points involved:

CLEVINGER, J. (Orally).

The sole question before the court is whether the article complained of is libelous *per se*. Under the rule in Ohio this is a question for the court. In order to determine such a question the article must be considered as a whole. We can not pick out segregated words or phrases that might be libelous, that reflect upon the plaintiff in the article, and say that they are libelous, but they must be considered in connection with the whole article, and the purpose of both as implied from the language used.

Referring to *Cleveland Leader Printing Co. v. Nethersole*, 84 Ohio St. 118, referred to by counsel, the court does not say in that case that it would not be libelous under any and all circumstances to publish that a woman had hysterics, but Judge Spear comments on the fact that that one phrase was injurious out of the whole article, while the same article taken together showed that there was no thought or idea on the part of the writer to attack Miss Nethersole because she had hysterics, but the whole thought and idea of the article was to discuss the stage from the standpoint of the criticism of some minister, who had stated his ideas of what the stage had contributed to society, and in the article referred to certain plays Miss Nethersole was then presenting in Cleveland, and mentioned a particular play and said that in London this particular one had been hissed to such an extent that Miss Nethersole had hysterics. Now, the court held that that was not libelous because the manifest intention of the writer was not to attack her at all, that he could not put any such construction upon it, but the court did not say that if he had attacked her and used the word "hysterics" under certain circumstances, that it would not have been libelous, but that you have to take the whole article and see what the writer intended by it, what he was aiming at, to determine whether or not that a particular portion of that article is libelous.

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There is no dispute, I think, between counsel, and there is no uncertainty in the court's mind, about what the law is in the case. I think the case of *Watson v. Trask*, 6 Ohio 531, lays down the law, or what is the law substantially all over the country.

There is a difference between slander and libel, there is no question about that. More harm can attach to a libelous article always, than to slanderous words, because of the opportunity of disseminating the injurious matter. The rule is laid down that anything that charges a person with having committed an indictable offense, involving moral turpitude, or holds him up to ridicule, or that tends to degrade him, is libelous *per se*, and the question for the court is to determine whether the article upon which the petition is predicated falls within that rule. The Supreme Court of the state of Ohio has held that whether or not it is libelous *per se* is a matter for the court to determine.

The plaintiff has rested his case. There is no claim at all of special damages in the petition. There has been no attempt to prove malice; whatever proof there was on the subject would rebut the idea of malice, because the plaintiff testified that in his conversation with the president of the defendant company, he expressly disavowed any malice, or intention to injure the plaintiff, and stated that the article was designed simply as a funny article, so that instead of proving any malice the direct opposite was brought out by the plaintiff's own testimony, so the direct question comes to the court to determine whether or not this article, or any part of it, is libelous *per se*, and thereby, through the operation of the law, malice is presumed without proof of it. The whole of the article complained of is as follows:

“KEEP OFF THE GRASS

is order farmer has issued to builders of state highway.

“Villa dangerous?

“Carranza a man to be watched?

“Bah, Fred Tappmeyer has 'em both beat an entire city block.”

First it should be told that the state highway department is rebuilding the “state road” between Martinsville and Blanchester. This well known and busy pike is one of the straightest roads in Clinton county, having but very few symptoms of curves in that

entire nine miles of its length. But mere straightness did not suffice when the state department drew up the plans for its improvement. It was necessary to move fences back on both sides of the road several feet to make the thoroughfare comply with the state's specifications. So the order went forth to move fences, telephone poles, ditches, etc., and there is where Mr. Tappmeyer comes in.

"Mr. Tappmeyer owns a farm, a good farm, too, between Blanchester and Midland City, on the south side of the pike. It is huddled in between the large tract of land that formerly belonged to Eberle Smith, and the land owned by the Deweys. Mr. Tappmeyer, a hyphenated citizen, who got his start on a hill farm across in Kentucky from Cincinnati, and for years sold vegetables and truck in the city, learned early to know what he wants and when he wants it, and when he made up his mind that he didn't want his fences moved back or the telephone poles reset farther over on his land, his mind was made up to stay.

"Next in order to make himself and his position clear, he issued orders to those engaged in the moving operations, that the first man that set a spade, a plow, a stake, or any doggoned thing that looked like it meant building operations in his soil, would be promptly shot, so this paper is told. And Mr. Tappmeyer went further and exhibited the field piece with which he proposed to defend his property against invasion.

"Mrs. Tappmeyer, also from der Vaterland, is taking an active part in the campaign of defense, and it is she who has had the most words with the "surveyor," as she calls Mr. Collett. The "surveyor" has had his troubles but also his amusement with the problem. One of the things he tells is that the heroine of the story was positive that they were right in the location of a certain stone marker at a corner of their land, and offered as a proof that they had stepped the distance and knew all about it. Without arguing the "surveyor" ran off the line and to his astonishment found the point not six inches away from the point the Tappmeyers had established by stepping. Speaking of preparedness, Mr. Tappmeyer has a genuine case of it! Has anybody set a shovel, plow, stake et cetera into Mr. Tappmeyer's land? Not yet.

"He is being labored with by the powers that be, but up to the present writing he has not broken down and wept tears

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of repentance for having decided to litter up his premises with corpses if his demands are not complied with. There is something about the thought of becoming a corpse that is more or less distasteful to the average pike-builder, and somehow none of them feel inclined to spade up any ground along Mr. Tappmeyer's line, though the preliminary work has been done all along the pike on both sides of the trouble zone.

"The difficult problem will be solved just as soon as some workman feels ready and willing to lay himself on his country's altar and run the risk of having his remains shipped home by parcel post, by boldly walking over on Mr. Tappmeyer's land and proceeding to punch it full of post holes, at the same time serving as a target for bullet-holes from the land owner's musket.

"In the meantime work in front of the Tappmeyer land is at a standstill. while the county commissioners have notified the state highway commissioner that as his engineer started the trouble by making the survey as he did, it is up to him to get an adjustment."

Now, let's take this article—not segregated parts of it, but the whole thing—and see what the idea is. It is headed "'Keep off the grass,' is order farmer has issued to builders of state highway."

The headlines were designed to give the reader an idea of what the contents of the article are. That would indicate that somebody, somewhere had told the builders of the state highway to keep off the grass, or the ground where the grass was growing. It starts out, the reading matter starts out, "Villa dangerous? Carranza a man to be watched " The interrogation point is used in both of these instances, which taken in connection with the other charge, reads, "Bah, Fred Tappmeyer has 'em both beat an entire city block." This paragraph is alleged to be one of the most libelous of the whole article.

Now, really, when you get at an analysis of that language—it means this, with those interrogation points and that expression following, that if Villa is dangerous, that if Carranza is a man to be watched. Fred Tappmeyer has them both beat a city block.

Is there any charge in the language, that Fred Tappmeyer is comparable at all with Carranza or with Villa? Is there anything in the paragraph that any person could think for a moment that the writer is comparing the character of Villa, and the character of Carranza with Fred Tappmeyer's character? It seems to me the meaning of that much of it is this: that if Villa is dangerous, if Carranza is a man to be watched, Fred Tappmeyer has them both beat. That is only preliminary. It goes on to say:

"First it should be told that the state highway department is rebuilding the state road between Martinsville and Blanches-ter. This well known and busy pike is one of the straightest roads in Clinton county, having but very few symptoms of curves in that entire nine miles of its length. But mere straight-ness did not suffice when the state department drew up the plans for its improvement."

This is explanatory, is leading up to the place where the trouble came in:

"It was necessary to move the fences back on both sides of the road several feet to make the thoroughfare comply with the state's specifications, so the order went forth to move fences, telephone poles, ditches, etc., and there is where Fred Tappmeyer comes in."

The idea of that whole article is to explain what the difficulty is, and is there a single, solitary hint that Mr. Tappmeyer is to be compared with Villa in character, or Carranza in character, any further than to say that perhaps if Villa is dangerous, he, Tappmeyer, might be dangerous, or if Carranza is a man to be watched, Tappmeyer is likewise to be watched? Now is it libelous to say that of a man?

"Tappmeyer owns a farm, a good farm, too, between Blanches-ter and Midland City on the south side of the pike. It is huddled in between a large tract of land that formerly belonged to Eberle Smith and the Deweys."

That is only descriptive of where his farm is located.

"Mr. Tappmeyer, a hyphenated citizen."

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Now, I think that has been emphasized in this case more than any other one expression in this whole article. That is not the whole sentence, and we have to see what the balance of it is to find out in what sense the writer had referred to Mr. Tappmeyer as a "hyphenated citizen."

"Mr. Tappmeyer, a hyphenated citizen, who got his start on a hill farm across in Kentucky from Cincinnati and for years sold vegetables and truck in the city."

This is parenthetical down that far. Next you take up the idea again:

"Learned early what he wants and when he wants it, and when he made up his mind that he didn't want his fences moved back, or the telephone poles reset further over on his land, his mind was made up to stay."

Now, in what sense did the writer use the word "hyphenated citizen?" In the sense that he was a traitor to his country? Could anybody, by any sort of imagination say that was used by way of indicating that Tappmeyer was a traitor to his country? The Unabridged Dictionary says that a "hyphenated citizen" is used in two senses, one to designate a person of foreign birth, or extraction, such as "German-American," "Irish-American," "Anglo-American;" another in the sense of opprobrium, and when used in the sense of opprobrium designates one who divides his allegiance.

Now, is there anything in the paragraph to show that this was used in an opprobrious sense, or simply to designate that he is of German extraction, and that he has that well-known German stubbornness about him of one who, when he sets his head, you can not turn. That is emphasized further on in the second paragraph below, where it refers to his wife, and it starts out, "Mrs. Tappmeyer, also of der Vaderland," the connection between the two is that a "hyphenated citizen" is used synonymously with "of de Vaderland" and it means they both are from German, or of German extraction, and hence that sentence:

"Mr. Tappmeyer, a hyphenated citizen, who got his start on a hill farm across in Kentucky from Cincinnati, and for years

sold vegetables and truck in the city, learned early to know what he wants and when he wants it, and when he made up his mind that he did not want his fences moved back, or the telephone poles reset further over on his land, his mind was made up to stay.”

It is perfectly apparent to an unbiased mind that the writer merely wanted to designate Tappmeyer as a man of German extraction, and that he was stubborn, and when he set his head, you could not turn him. When he speaks of Mrs. Tappmeyer “also from der Vaderland” it is to designate her as of German extraction. The dictionery says there are two meanings to be given to the word “hyphenated citizen”—it may be used in a sense of compliment, or an opprobrious sense. The testimony of the witness, Welborn, yesterday, was in the nature of the opprobrious sense, and he indicated that it could not be used in any other way than as an opprobrium. If the term could be used in but one sense, the court would be bound to take his testimony as the definition notwithstanding that I think it is the most imaginary definition of the term that I ever heard. Where a word, or phrase, is used in more than one sense, it is for the court to determine from the whole article what meaning was intended. The court thinks it is manifest on the fact of the paper here that it was used in that sense of designating his nationality, or extraction. The mere fact that you say it was used in another sense, when it manifestly was not, does not make it so. If the very article itself contradicts the allegations of the petition, or the idea of the witness, the court is not bound to accept the definition of the witness as conclusive.

It seems to me that nobody could in any way say that the language that I have just read which refers to Mr. Tappmeyer as a “hyphenated citizen,” connected with the other part of the article in which it is stated Mrs. Tappmeyer is “also from der Vaderland,” was intended to do anything more than describe him as a German, or one of German extraction.

The further reading is:

“Next in order to make himself and his position clear, he issued orders to those engaged in the moving operations, that the

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first man that set a spade, a plow, a stake, or any doggoned thing that looked like it meant building operations in his soil, would went further and exhibited the field piece with which he proposed to defend his property against invasion."

Then comes the statement about Mrs. Tappmeyer, "also from der Vaderland," and certain phraseology there which has no further application to this case, and on down to:

"Speaking of preparedness, Mr. Tappmeyer has a genuine case of it. Has anybody set a shovel, plow, stake, et cetera into Mr. Tappmeyer's land? Not yet! He is being labored with by the powers that be, but up to the present writing he has not broken down and wept tears of repentance for having decided to litter up his premises with corpses if his demands are not complied with."

Now, that is very much exaggerated. Is there anything in this article from beginning to end that would lead any reasonable, unbiased mind to believe that the paper meant to convey, or could anyone understand it meant to convey, that he meant to kill a lot of people and "litter up his premises with corpses?" There is a well known line of writing by which a small and sometimes imaginary fact is grossly exaggerated in order to make it funny, but it is never intended that anybody would believe it, and it never is believed. The court can not overlook these facts; it has to put a reasonable construction on this language. Is there anything from top to bottom that is meant to convey the idea that Tappmeyer literally was going to "litter up his premises with corpses?" It goes on further:

"There is something about the thought of becoming a corpse that is more or less distasteful to the average pike builder, and somehow none of them feel inclined to spade up any ground along Mr. Tappmeyer's line though the preliminary work has been done all along the pike on both sides of the trouble zone. The difficult problem will be solved just as soon as some workman feels ready and willing to lay himself on his country's altar and run the risk of having his remains shipped home by parcel post."

Now, can it be said for a moment that any person in his right mind took that seriously? That is one of those exaggerations or enlargements of really small and imaginary facts in order to make it readable and amusing, that is well recognizable in daily papers. The article goes on:

“parcel post, by boldly walking over on Mr. Tappmeyer's land and proceeding to punch it full of post holes, at the same time serving as a target for bullet holes, from the land owner's musket.”

It is all in the same vein. There is absolutely nothing from beginning to end where any reasonable person, it seems to me, could say that the writer of this meant anything more than that the public authorities were asserting the right to move Tappmeyer's fences back, and that he was standing on his rights to the point, that if they attempted to move them back, he would use a gun. Now, is it a libel to say that? Is it an indictable offense? Does it hold him up to ridicule, or to scorn because he stands for his own rights? He said himself on the witness stand, he had threatened to use a gun, but that is neither here or there. It is a question of what this article means. Is there anything of the kind in it? It is just what I have said, Mr. Tappmeyer was insisting that his line came to a certain point and that his fences should not be moved, and if anybody attempted to move them (and we must read into it that he means unlawfully to move them) he would repel the invasion with a gun.

Is there anything in the article signifying anything more than that he intends to stand on his rights to the point of using a gun, if necessary, if somebody attempts an unlawful entrance on his premises? The utmost offense, if any, it seems to me, that the language would convey would be a menacing threat. The text-writers (and I think correctly) have divided that statute into three parts: assault and battery, assault, and the crime of making menacing threats. There might be a charge of making menacing threats under certain circumstances that

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would be a libel, but is it a libel, is it an indictable offense that would involve moral turpitude if a man makes the threat that "if you are going to enter my premises, unlawfully, I am going to repel you even to the extent of using a gun?" Such an offense, if an offense at all, does not involve moral turpitude. If he would go out some place and make a menacing threat that he was going to kill somebody, without any circumstances that warranted it, it might involve moral turpitude. To be libelous it must be an indictable offense that involves moral turpitude. I don't see anything that holds him up to ridicule. Now, does this article hold him up to ridicule? I think it was well said by Mr. Thorpe yesterday, when he mentioned a matter that has impressed the court, that if there is anybody held up to ridicule and any fun made of anybody in this article it was of the officers on the job, who allowed themselves to be bluffed by Tappmeyer; it seems that the whole idea was to make fun of the officials of the state of Ohio who let one man bluff them out. It rather lionize Mr. Tappmeyer and makes a hero of him by the idea that he had bluffed the whole crowd. It does not tend to disgrace him a particle. I can not find anything through this whole article that it seems to me when you consider it fairly, in the way it would strike a disinterested citizen, not in the light that it strikes a citizen who thinks he is aggrieved, but in the light it would strike a reasonable citizen, that indicates anything more than what I have defined. We had an experience in trying to get a jury that shows this fact. Not one of the men who had read this article could tell what it was about. It had made no impression on them whatever. That is the way it would strike anybody, that there was nothing in it from beginning to end in any serious way charging Mr. Tappmeyer with doing anything more than taking a stand that his line went to a certain point and that if these men attempted to go beyond that point, unlawfully (and we must say unlawfully) he was going to repel that invasion even to the point of using a gun.

There is nothing in the argument that causes me to change my notion that this is not a libelous article *per se*, when considered fairly, when considered in the light it would strike an

ordinary citizen. There is no special damage alleged; no malice has been proved.

It seems there is nothing for the court to do but to terminate this case by directing a verdict. If I am wrong, I will assist the gentlemen in every way possible to have it corrected.

**EXCEPTION TO FEE ALLOWED TO ATTORNEY FOR A
DECEDENT'S ESTATE.**

Common Pleas Court of Hamilton County.

IN RE ESTATE OF JOSEPH KOLB, DECEASED.

Decided, November, 1919.

Decedent's Estates—Settlement Rendered Difficult and Trying by Dissensions among the Heirs—Strain and Labor Thus Thrown upon Counsel Recognized in the Fixing of his Fee.

An order by the probate court fixing, after an extended hearing, an attorney's fee for services in connection with the administration of an estate where there had been bitter contentions among the heirs and the work of harmonizing the conflicting interests became a serious task, will not be set aside on the weight of the evidence, where no testimony was offered as to the value of the services rendered except that of the claimant himself, and the exceptors having limited their efforts to criticism of what was done.

Chas. E. Schell, John A. Scanlon and Harry Klein, for the exceptions.

Edward H. Jones and John Weld Peck, contra.

COSGRAVE, J.

This cause came into this court both by way of appeal, and petition in error.

Before proceeding with the hearing of the case the plaintiff in error elected to proceed on the petition in error and the record from the probate court, which is very voluminous.

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Estate of Kolb.

In this proceeding a reversal is sought of a judgment rendered by the probate judge, confirming the account of Cynthia Kolb, as executrix of the estate of the late Joseph Kolb. Objection is made by Josephine Schell, one of decedent's children; no objection is made by any of the other four heirs. The exceptions, among other things, include a fee for legal services rendered by Frank R. Gusweiler during some three years prior to his election to the Superior Court bench. The record discloses that the question of fees for services rendered to this estate by said Gusweiler, was heard covering parts at length of five or six days, and judgment was rendered in his favor by his Honor, Judge Lueders, on June 12, 1916.

The executrix under order of the lower court was directed to pay said judgment out of assets of the estate then in her control, and a lien was given on said assets for said payment. More than a year thereafter the executrix paid said judgment, making some reduction, saving to the estate more than seven hundred dollars. The executrix then filed her account accordingly, and to this action Josephine Schell filed exception.

She also excepted to allowances of fees to Edward H. Jones, Harry Klein, and James G. Stewart, for certain legal services rendered the estate by them, as well as to certain allowances made to the executrix.

Joseph Kolb, the decedent, died leaving a will which was presented for probate on February 15, 1913, and admitted to probate on February 21st of the same year. His estate consisted of a large holding of stocks and bonds, likewise certain real estate.

Cynthia Kolb, the widow of the decedent, was named as executrix under the will, and gave bond in the sum of \$200,000. After filing an inventory of the estate in April of the same year, an additional bond of \$100,000 was filed.

Shortly after the filing of the appraisement it was sought to have a trustee appointed instead of the executrix named in the will. This was resisted by some of the decedent's children, there being four daughters and two sons.

In December, 1913, notice of a contest of the will was filed,

case No. 155,567, in the common pleas court. By agreement of all parties a verdict was rendered sustaining the will, on November 10, 1915.

Various other suits and litigation followed, continuing over a space of some three years, the details as to the character of service, time and attention, appear of record.

This court will not undertake to review in detail all of the proceedings and steps taken in this matter in which the claimant rendered services. The court has carefully reviewed the record containing all the evidence presented in the probate court; the case was thoroughly and well tried in that court, and every opportunity given by his Honor, Judge Lueders, for a full presentation of all the facts, circumstances and history of the estate.

The services of the claimant covered a period of approximately three years. Unfortunately, soon after the death of the father, discord, dissention and discontent arose among the children of the deceased; the mother well on to seventy years of age, who, no doubt by her services and presumably also the services of the older daughters, largely aided in the accumulation of this large estate, became the storm center of these conflicting purposes.

Mr. Gusweiler, as attorney for the executrix, as shown by the record, was called on time after time to endeavor to bring some semblance of unity of purpose among the children of the deceased. No one realizes more than lawyers who have had cases of this character in hand, the strain it places on the lawyer representing the estate and executrix of the will.

It appears from the record that during all this time disputes were always present of one kind or another, not only occupying time, but imposing upon him the hardest task lawyers are obliged to perform in seeking to adjust and harmonize conflicting purposes among heirs.

The hearing on application for the allowance of fees before his Honor, Judge Lueders, occupied several days; there was a vigorous examination and cross examination of the claimant, Mr. Gusweiler, and finally the matter was submitted for the determination of the probate judge, who after holding it for some

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Estate of Kolb.

time under consideration, allowed the claim of Mr. Gusweiler, with some reduction.

Strange as it may seem, there was no testimony offered as to the value of the services rendered by claimant, except that of the claimant himself. The value of his services was sought to be minimized by the severity and sharpness of the cross examination, by the several lawyers interested. When the case was finally submitted to Judge Lueders on the record, accompanied by voluminous and somewhat bitterly worded briefs, his Honor allowed this claim.

It is now submitted to this court to either affirm said judgment, or to set it aside. There was nothing for the court below, nor is there anything for this court, to weigh or determine, except the value of the services as testified to by the claimant, and the criticism by way of cross examination and by lengthy briefs.

The court below had this entire matter presented in a way that it can never be presented by a bill of exceptions. A trial judge becomes conscious and is influenced by the shades and shadows that accompany the testimony of witnesses and the adverse criticism of opposing counsel. He is far better able to determine what is just and right in the premises than is the reviewing court.

It is a well settled rule in Ohio that a reviewing court has no right to set aside the judgment of a lower court on the weight of the evidence unless it appears that the judgment is manifestly against the weight of the evidence.

This court can not say that the judgment of the court below was not in accordance with the manifest weight of the evidence, but on the contrary, after a thorough examination of the record in this case, the court is satisfied that the judgment of the court below was sustained absolutely by the weight of the evidence presented before that court.

The lower court having passed on the issue made, as the record discloses, and all parties in interest being present, or represented by counsel, and having rendered judgment, the executrix had authority at any time to pay said judgment, which she did in July, 1917, and this item of the account became *res adjudicata*.

After the probate court had allowed these fees on special hearing had, the executrix took an appeal, and in proceedings in error thereto, and thereafter she paid said judgment in accordance with said allowance. The executrix did exactly what the probate court ordered her to do, and she had a good legal right to dismiss her appeal and error proceedings, which was done before his Honor, Judge Caldwell.

This daughter now excepting to her mother's account, also objected to her mother complying with Judge Lueders' judgment and order, and endeavored to prevent her paying said judgment, but Judge Caldwell decided that the mother had a legal right to do so.

Now, as to the exceptions to the allowances made by the probate court to Judge Edward H. Jones, Harry Klein, and James G. Stewart, for legal services rendered, as well as the other items excepted to, this court fails to find any reason whatsoever from the record to sustain the exceptions of Josephine Schell, the daughter. This court is satisfied that the judgment of the court below was sustained absolutely by the great weight of the evidence in every particular, as to all the items excepted to, and the judgment of the court below is accordingly affirmed.

The court might say in passing, that technically this court had no jurisdiction to review the judgment of his Honor, Judge Caldwell, by reason of the fact that the executrix having instituted proceedings in error in this court, and his Honor, Judge Caldwell, upon hearing the same and at the request of the executrix dismissed said proceedings in error. Nevertheless, his Honor, Judge Caldwell, has requested this court to review the case as though it had never been presented to and determined by him.

This court has done so and is satisfied that Judge Caldwell was right in dismissing the proceeding in error instituted by the executrix.

An entry may be submitted affirming the judgment of the probate court.

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Good v. Mayer.

LIEN OF A WAREHOUSEMAN ON MORTGAGED CHATTELS.

Common Pleas Court of Montgomery County.

WILLIAM E. GOOD V. MEYER & MENDOZA.*

Decided, October 22, 1919.

*Conflicting Rights of a Warehouseman and Mortgagee of Chattels—
Section 8484 Construed.*

1. Where mortgaged chattels are held by a warehouseman who is demanding his charges as a condition of surrender of possession, an action of foreclosure and not of replevin is the mortgagee's remedy on default of payment by the mortgagor.
2. In such a case as between the mortgagee and the warehouseman, the right of possession until foreclosure is in the warehouseman.

W. S. Khotchammel, for plaintiff in error.

A. S. Schulman, for defendants in error.

SNEDIKER, J.

This case is before the court on error to the judgment of the municipal court where a judgment was rendered in favor of Meyer & Mendoza, the defendants in error, and against William E. Good, the plaintiff in error. The action was begun in the court below as one in replevin. An affidavit was filed by the defendants in error through their attorney in which they claimed the right to the immediate possession of certain chattel property. To the claim of the defendants in error the plaintiff in error filed an answer in which he said:

“This answering defendant represents to the court that he has stored in his warehouse in the city of Dayton, Ohio, the goods and chattels set out and described in the statement of claim and affidavit in replevin herein and the bailiff's return thereon; that

*Affirmed by the Court of Appeals on the reasoning of the opinion of Judge Snediker.

second day of September, 1916, and this answering defendant has a valid lien upon said goods for the hauling of said goods amounting to the sum of three dollars; that he has a valid, legal said goods were stored with this answering defendant on the and subsisting warehouseman's lien upon said goods and chattels hereinbefore described and set out for the said hauling as hereinbefore set out and for the storage at the rate of two dollars per month for each and every month from said second day of September, 1916, until his said charges and lien have been fully paid and satisfied. This answering defendant further represents to the court that his said warehouse lien is prior to and paramount to all claims, debts or demands against said goods of every kind and description whatsoever. This answering defendant further says that he is entitled to the legal possession, control and custody of said goods and chattels hereinbefore described and set out until his said warehouseman's lien is fully paid and satisfied. And he prays the court that his rights herein may be protected and satisfied and for such other relief as he may be entitled to in the premises."

The facts which relate to the issue made up by the statement of claim and affidavit filed in the municipal court and by the answer filed by Good, as they appear in an agreed statement of facts filed herein, are as follows:

On the 17th day of March, 1916, Arthur B. Cudney, who is also a defendant, purchased of Meyer & Mendoza the goods here claimed in replevin, which were household goods; the entire purchase price was \$389.90. On this amount there was paid to August 21, 1916, the sum of \$134. At the time the goods were bought Cudney agreed to pay at the rate of four dollars a week, and executed and delivered to Meyer & Mendoza a chattel mortgage upon all the goods to secure the purchase price. This mortgage contained the following clause:

"If the said Arthur B. Cudney and Mrs. Arthur B. Cudney, his wife, shall promptly pay to Meyer & Mendoza each week hereafter, beginning on the 24th day of March, 1916, the sum of four dollars per week, until the sum of \$299.60 (the balance of the purchase price), shall have been paid, then this conveyance shall become null and void; otherwise to remain in full force and effect."

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This mortgage was filed with the recorder of Montgomery county, Ohio, on March 8th, 1916. There was due upon the price agreed to be paid by Cudney on and after August 21st, 1916, the sum of \$255.90. No payments were made by Cudney nor by his wife after August 21st, 1916. On September 2nd, 1916, the goods were, at the request of Cudney, who was in possession, hauled to and stored in the warehouse of the William E. Good Transfer Company, here, as we understand, represented by William E. Good, and were there kept until April 18, 1917, when an affidavit in replevin was filed by these defendants in error. William E. Good, the plaintiff in error is a warehouseman within the meaning and purview of the General Code and of those sections which particularly refer to warehouses, warehouse receipts, etc.

Cudney and his wife are in default for answer or demurrer, and the question is now before the court as to which of these parties, plaintiff in error or defendants in error, is entitled to the possession of the goods and chattels in question.

The solution of what has been propounded for the court to answer involves a construction of Section 28 of the Code, passed May 9th, 1908, entitled: "An act to establish a law uniform with the laws of other states on warehouse receipts." Section 28 is now Section 8484 of the General Code, and reads as follows:

"Subject to the provisions of Section 30, a warehouseman's lien may be enforced:

(a) Against all goods, whenever deposited, belonging to the person who is liable as debtor for the claims in regard to which the lien is asserted; and

(b) Against all goods belonging to others which have been deposited at any time by the person who is liable as debtor for the claims in regard to which the lien is asserted, if such person has been so entrusted with the possession of the goods that a pledge of the same by him at the time of the deposit to one who took the goods in good faith for value would have been valid."

Section 30 of the act, now Section 8485 of the Code, has no relation to the facts before us and need not be quoted.

It is apparent from the agreed statement of facts that at the time of the filing of this action in replevin, Cudney, who had

deposited the goods with the plaintiff in error, was in default for payment, and the chattel mortgage given by him to the defendants in error, had become absolute. There remained to Cudney but one interest or right in the goods and chattels covered by the mortgage. That interest or right was the equity of redemption. There is not in Ohio any section of the Code giving the mortgagor a right to redeem. So that he has but the equitable right to do so. So considered,

“redemption is an equitable process by which a mortgagor or other person interested in personal or real property, subject to a mortgage or incumbrance, may recover the absolute ownership thereof upon certain terms which are usually the payment of the principal amount due with interest thereon and the costs of the mortgages.” * * * “Wherever there is a right to foreclose there must of necessity be a right to redeem, because foreclosure is in default of redemption. An equity of redemption is the right which the mortgagor has of redeeming his property after it has been forfeited at law for the non-payment of the mortgage debt, or money secured by the mortgage at the time stipulated and agreed upon by such mortgage, by paying the amount of debt, interest and costs. It is the mere creature of a court of equity, founded upon the principle, that a mortgage is nothing but a pledge for the purpose of securing the payment of the amount for which the mortgage is given to the mortgagee, the ownership of the property being considered, upon the principles of equity and justice, to be in the mortgagor, subject only to the legal title of the mortgagee as far as such title may be necessary for his security.” Herman on Chattel Mortgages, pp. 459-460.

“The title of a mortgagee, on default, can not become so far absolute as to deprive the mortgagor of all his right or interest in the property. In those states where it is held, that upon default the title is perfected in the mortgagee, the doctrine is also well settled, that the mortgagor, in equity, has his right of redemption, and the ‘absolute title’ which it is held that the mortgagee acquires, which is so constantly used by the courts, is an absolute legal title, and that, notwithstanding default, there is a right, or, as it is called, an equity of redemption remaining in the mortgagor.” Herman on Chattel Mortgages, page 463.

In 87 Ark., page 502, quoting 11 Amer.-Eng. Ency. of Law, 2nd Ed., 209, 210, we find:

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“An equity of redemption is an asset in the mortgaged property, and is subject to all the incidents of ownership. It may be conveyed or devised; it descends to the owner's heirs or personal representatives according to the nature of the mortgaged property.”

As at the time when this mortgage became, as we ordinarily say, absolute, Cudney had this right, this interest in these chattels, our question is, is this such an interest, the property being in the possession of Cudney, that a pledge of the same by him at the time of his deposit of the goods with the warehouseman, would have been valid?

It is the law that “it is not necessary that the pledgor be the absolute owner of the thing pledged. He may have only a limited interest therein.” Hale on Bailments and Carriers, page 113.

In the 36 Conn., in the case of *Robertson v. Wilcox*, page 426-430, the Supreme Court, in discussing the questions before it, say:

“Sometimes the pledgor has only a limited title to the property pledged. He may have only an interest for life, or for a term of years, or he may have simply a lien, or a right by a former pledge; still he may pledge the property to the extent of his interest.

“A debtor may pledge any interest that he owns in property.” 31 Cyc., page 794.

We are led to conclude, therefore, that at the time these goods were stored by Cudney, he could make a pledge of the same to the extent of the interest which he then had, and such pledge would be valid. If the deposit was made under these conditions, what are the respective rights of the parties here represented? As we have said, the defendant below instituted proceedings in replevin, and claimed the right to possession; and Good, the plaintiff in error, then claimed the same right. No question could have been made as to the right of the defendant in error, except for the fact that this deposit of the goods had been made with the warehouseman.

What are the rights of the warehouseman who is entitled to hold the goods as security for his services as against the defendants in error? The same authority which we before quoted (36

(Conn.). defines the rights of a pledgee under such circumstances and follows what has already been recited with these words:

“But the pledgee in all such cases has no right to sell the property on the non-fulfillment of the contract, although he may pursue the proper course for the purpose, for the pledger has no such right to confer. The pledgee must content himself in such case with holding the possession of the property till his debt is paid, or the interest of his pledger in the property has expired.”

And in 31 Cyc., already referred to, after what we have quoted, we find, “and the pledgee will take such property subject to the liens, whether legal or equitable, of other parties, existing at the time.”

The rights of a warehouseman are no greater when his depositor has but a limited interest. When would this interest of Cudney, or his right to an equity of redemption, expire?

Plainly only upon foreclosure of the mortgage by the defendant in error, and until such foreclosure Cudney is entitled, by availing himself of the right to the equity of redemption, to redeem his goods. Kent (Vol 2, pages 634-635) defines the lien of a warehouseman, as a particular lien favored in law. Possession is not only necessary to the creation, but to the continuance, of such a lien. The court may not find the right of possession to the chattels so held by the warehouseman in the mortgagee, when the lien which exists, and which the law favors, can only be preserved by possession of the warehouseman. Foreclosure will terminate both the interest of the mortgagor (Cudney) and the lien of the plaintiff in error, and this is the proper remedy of the defendant in error. At the commencement of this action plaintiff in error had the right to hold the property to preserve his lien. This being true, and no foreclosure having been brought by the defendant in error up to this time, it is our opinion that the court below erred in finding for the defendant in error and against the plaintiff in error.

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Harris v. Webb.

PLEADING IN CASES OF INJURY BY AUTOMOBILE.

Common Pleas Court of Franklin County.

NETTIE HARRIS V. SCOTT A. WEBB.

Decided, November 21, 1919.

Legal Conclusions Substituted for Allegations of Fact—Negligence Should not be Alleged in the Precise Language of the Statute—Indiscriminate Use of the Words Proper, Adequate, Reasonable, Ordinary and Necessary in Averring Degree of Care Required—Avoidance Needed of the Vices of the Old System of Pleading.

1. An allegation that an automobile was run "at a high, dangerous, excessive rate of speed," or "without having due and proper control" "without having due and proper regard for the safety of the person and property" of another, are statements of conclusions and not of fact.
2. The requirement that an automobile shall not be run at a speed greater than is reasonable and proper is an embodiment of the common law rule of ordinary care.

Charles R. Doll, Attorney for Plaintiff.

Taylor, Williams, Cole and Harvey, contra.

KINKEAD, J.

A motion is filed to the petition. The court has carefully considered the pleading, and makes the following comments and orders.

An allegation that an automobile was run "at a high, dangerous, excessive rate of speed," is not a correct or legal averment, and should be and is ordered stricken from the pleading. It is a conclusion; the speed claimed should be alleged, and this is done.

To state that: "Without having *due* and *proper* control" of without having *due* and proper regard for the safety of the person and property of plaintiff" is not a correct or legal averment.

What was or was not done should be alleged. This allegation is therefore ordered stricken out.

To allege that a defendant failed and neglected to keep his automobile under control would conform to legal rules of pleading.

To aver that one did not have "*due and proper control*" is a conclusion. According to Webster's International Dictionary, not to have *proper control* of an automobile might mean that the driver did not have *suitable or appropriate correct or accurate control* of the car; or it might be considered or held that *proper control* of an automobile was a control "*conforming to usage or conventions.*"

Control of a motor vehicle in conformity to usage or convention more accurately conforms to the common law conception of ordinary care, which rule it is assumed the statute embodies, and which in our opinion is all that our statute does embrace.

Proper control according to one of its synonymic meanings might also designate *suitable or appropriate control*, or *accurate or correct control*. Again it might be considered as expressive of a control "*conforming to usage or convention.*"

"*Without having due and proper control,*" and "*without having due and proper regard for the safety,*" etc., and at a speed "*greater than was reasonable or proper,*" as averred in the petition is using the words and language of the statute, Section 12603, which is expressive of statutory rules of law.

Due and proper, reasonable and proper, are not only legal conclusions, not the statement of fact, but is the statement of statutory expressions of rules of law.

The word proper is also used in the statute in respect to improvement of roads which require a contractor to place *proper* barricades at dangerous places. In framing an instruction to the jury in such a case the writer used one of the synonymic definitions of the word "*proper.*" The statute in that case used the expression "*necessary and proper signals, safeguards and barricades,*" which should be "*properly placed.*"

This statute (road statute) was evidently framing a rule of

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conduct in respect to conditions not covered by common law doctrine, and to meet special hazardous conditions. Requiring the placing of all necessary and proper signals, safeguards and barricades, and that they should be properly placed, seemed to specify requirements beyond the ordinary common law doctrines.

The word *proper* being used with the word *necessary*, it was considered that the statute evinced a purpose to enact a rule beyond the common law doctrine of ordinary care. Hence the court charged the jury that the contractor was obligated to place lights, etc.,

“As well as proper and *adequate* barricades, such as were reasonably calculated to avoid injury to persons traveling on the highway, and such as were reasonably and adequately deemed *necessary*.”

This was an instruction slightly in excess of the common law rule of ordinary care; the word *adequate* imposes a greater obligation than does the common law rule of ordinary care. Proper barricades means sufficient ones; barricades which are sufficient, adequate in amount or number to the need; or enough.

The circumstances and conditions which the road statute designed to cover where there might be a number of excavations and dangerous places—this statute used the word *necessary* and coupled with it the word *proper*, thus showing a purpose to require a contractor to place such barricades as were necessary and proper which imposes a greater obligation than the mere use of ordinary care.

In *Di Fernando v. Bowers*, 21 N. P. (N. S.), 49, this court held that Section 12603, forbidding automobiles from being run at a speed greater than was reasonable and proper was not intended to do more than to incorporate in or express the rule that a driver of an automobile was bound to drive the same at such speed as persons of ordinary care and prudence usually and ordinarily drive the same under such circumstances.

To associate the word *proper* with the word *reasonable* as in Section 12603, and to provide that a driver of an automobile

shall not run at a speed greater than is *reasonable* and *proper*, considering the width of the street and the traffic, etc., does no more than to require ordinary care. The word *proper* used with the word *reasonable* which may have the same meaning as ordinary care, and that the appropriate synonym in harmony with the word *reasonable* was intended to apply and govern, rather than a synonym requiring greater care than ordinary, as sufficient or adequate.

The petition in this case undertakes to partially use the language of the statute in respect to the handling of an automobile. This is improper; it is not the statement of fact; it states law.

The common law conception of negligence is the failure to use *ordinary* care. Many are inclined to substitute and use *reasonable* for *ordinary*. Reasonable and ordinary have common elements.

Reasonable speed, for example, is governed by reason; it is not excessive or immoderate, and does not exceed that which is usual or proper under the circumstances.

Ordinary speed is that *commonly, usually* or *ordinarily* used, according to *established order*, such as ordinarily prudent persons ordinarily observe or drive a motor vehicle—according to an established customary habit of reasonably prudent persons.

It was not the intent of the Legislature to do more than to incorporate in the statute the common law rule of ordinary or reasonable care. This clearly was the purpose.

The statute in the use of the word *proper* designed that the driver of an automobile should operate it at a reasonable and proper speed, such as was ordinarily or usually driven under similar circumstances or under like circumstances by ordinarily prudent persons, considering the width, traffic, use and the general and usual rules of the highway. The width, the traffic, use and rules of the road are part of the circumstances; therefore it is clear upon full consideration that the statute embodies the common law, as it was never proper to plead rules of law, and is not now.

It is becoming common to use the precise language of this

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statute in alleging the negligence of the driver of an automobile. The present petition does this; this plain violation of the rule of pleading should not be permitted.

It is improper to attempt to allege negligence in the precise language of the statute; facts showing neglect should be alleged so as to disclose the negligent acts.

The only fact alleged in the petition is that defendant drove the automobile at a speed of about forty miles per hour. The following is the whole averment of the petition:

“Plaintiff further says that the defendant carelessly, *recklessly*, negligently and *unlawfully* operated said automobile at a *high, dangerous, excessive, reckless* rate of speed, to-wit: at a speed of *about* forty miles per hour, and *without having due and proper control* of the same, and *without having due and proper regard for the safety and property of plaintiff and at a speed greater than was reasonable and proper, having regard for the width, traffic, use and the general and usual rules of such highway and so as to endanger the property, life and limb of plaintiff.*”

The parts of the foregoing allegation which are in italics are improper averments; they do not allege ultimate facts, but are mere conclusions or are allegations of the provisions of the statute hence entirely improper. The court orders all of the foregoing parts which are in italics to be stricken out.

The allegations in the second paragraph, “*who, in a careful and prudent manner,*” are also improper and are ordered stricken out. It is *not* incumbent upon plaintiff to make such an allegation.

It is alleged “that he (defendant) saw, or by the exercise of ordinary care and prudence, could have seen plaintiff and her perilous position,” etc. What did he do, does the pleader know, or is he guessing?

This is an equivocation; that is, it has a double meaning, and it is not definite and certain, therefore is improper.

This averment should be amended by making it definite and certain, by taking one position or another.

And her “perilous position,” as alleged, assumes—without.

stating the fact—that plaintiff was in a position of danger; the pleading, however, does not state the fact, and the plaintiff is ordered to reform the allegation by stating the fact claimed.

“Or by the exercise of ordinary care and prudence (he), could have seen” is an improper allegation. It is a conclusion, and is not the statement of a fact. The position of plaintiff is that defendant either saw or could have seen, etc. It should be made definite.

A proper fact is stated that the *view* of defendant was *unobstructed*; so that the position of plaintiff was obvious.

“*While so carelessly, negligently, recklessly and unlawfully operating, etc.*,” is a repetition. It is parenthetical, the sentence being complete without the underscored parenthetical words. Repetition is a vice in pleading, and the repetition of the words used being mere characterization do not state any fact.

The averment that “the aforesaid negligence of the defendant was then and there the proximate cause which produced the injuries to her” is improper and is ordered stricken out. Proximate cause is a legal term to designate the immediate legal cause where it appears that both parties were negligent; of course, it has no place in this petition, where no negligence on the part of the plaintiff appears. Then as it stands it is a mere legal conclusion.

We are led to make the observation that in this particular class of litigation there has been a good deal of guessing in the petitions filed; many such cases are being tried and it is appearing without the shadow of a doubt, that neither party nor counsel are probably aware of the precise manner of the occurrence of collisions or injury in automobile cases; they happen so quickly and the spectators or participants sometimes know little about the facts. In such event there is much speculation and guessing; hence many go awry.

We must take more pains in following and observing rules of pleading, if we wish not to descend to the vices of the old system, which are well illustrated by a pleading prepared many years ago under the old fashioned pleading in the state of West

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Virginia. It was the only sovereignty, perhaps in the world, then following the old common law practice. There were only a few days left in which to file a declaration in the West Virginia courts for injury to a miner. It was prepared with allegations in every conceivable way in which it could be imagined the injury could have been caused. That was the old way at common law, and history is repeating itself—it is quite frequently the way it is now done.

JURISDICTION IN MOTOR VEHICLE INJURY CASES.

Court of Common Pleas of Hamilton County.

HARRY J. MARSCH v. W. D. BRAWLEY.
MARGARET KATTENHORN v. W. N. BRAWLEY.

Decided, November 14, 1919.

Venue—Construction of Section 6308—Jurisdiction in Cases of Injury by Motor Vehicle—Whether Acquired May be Determined on Motion to Quash Service.

Section 6308, providing that "actions for injury to a person or property, caused by the negligence of the owner of a motor vehicle, "may be brought, by the person injured, against such owner in the county wherein such injured person resides, does not authorize the prosecution of a suit in a county in which neither the plaintiff nor the defendant resides and the defendant can not be summoned.

Charles L. Hopping for the motion.

John A. Scanlon and *J. Earl Klein* contra.

DARBY, J.

Motions to quash service of summons, were filed in these cases.

The petitions aver that the accident, which is the basis for the actions, occurred in Indiana. The residence of the plaintiffs is

not revealed in the petitions. Upon the filing of the actions in this court summonses were issued to the sheriff of Preble county, this state, where the defendant resides and were duly served upon him there.

The motions are made upon the grounds that this court has no jurisdiction of the actions, inasmuch as the defendant is a resident of Preble county, and the plaintiffs are residents of Kentucky.

It is sought to sustain the jurisdiction in this court under favor of General Code, Section 6308, which provides:

“Actions for injury to a person or property, caused by the negligence of the owner of a motor vehicle, may be brought, by the person injured, against such owner in the county wherein such injured person resides. A summons in such action against any defendant or defendants shall be issued to the sheriff of any county within this state wherein such defendant or defendants reside and may be served as in other civil actions, notwithstanding any contrary provision of law for the service of summons in civil actions.”

This section has been sustained as valid and constitutional in *Allen v. State*, 84 O. S., 283, upon the theory in general that the Legislature has a right to determine the jurisdiction of the courts of the state, and a resident of the state is not denied any constitutional right by being required to defend an action in a county other than the one in which he resides.

Prior to the enactment of the section last referred to, actions not local in their character might be brought in the county in which the defendant resides, or may be summoned, except as to certain actions enumerated in General Code, Section 11277.

Section 6308 extends the jurisdiction in cases of injury by motor vehicles to the county in which the injured person resides.

It would not be claimed that either under that section or Section 11277, an injured person living in Hamilton county could go into Cuyahoga county and there sue a defendant who did not reside in that county or who could not be summoned there. It would seem that the purpose of the section is for the convenience of the injured person, in allowing him to sue where he resides,

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even though it is in the nature of a punishment upon the defendant in compelling him to go possibly to a remote part of the state to defend. It seems clear that the purpose of the statutes is to give the injured person his choice to sue in the county where he resides, in the county in which the defendant resides, or in a county in which the defendant may be summoned.

If the purpose of the section, *i. e.* 6308, is as above stated, then it is clear that a person who does not live in any county of the state of Ohio, does not come within the purview of that section.

On behalf of the plaintiff it is claimed that a statute denying to a citizen of another state a remedy given to a citizen of this state contravenes the federal Constitution. *Johnstone v. Kelly*, 74 Alt., 1099, is cited to support this claim.

It is not necessary to challenge the authority of that case to support the opinion of the court in this case. The plaintiffs here are seeking to prosecute an action, under the section referred to, in a county in which they do not reside, and where the defendant does not reside and can not be summoned.

A citizen of Ohio could not do this under the authority of this section, and to deny to the plaintiffs the benefit of this section is depriving them of no right which citizens of this state would have under similar circumstances.

The right of the defendant to quash the summons is challenged on the ground that it does not appear in the petition that the defendants are residents of the state of Kentucky.

It may be that in cases under Section 6308, depending upon the residence of the injured party, the petition should allege the residence, but if it does not the defendant has a right in a motion to quash the service to show that the injured party is not a resident of the county where the action is brought.

In *Burke v. McClintic-Marshall Const. Co.*, 9 N.P.(N.S.), 577, in a decision by Judge Evans, of the common pleas court of Franklin county, it is said (syllabus) :

“1. Whether the service had upon a defendant corporation has conferred jurisdiction upon the court is a question which may

be properly raised by motion to quash the service and set aside the return.”

In the opinion of the judge in the same case, is the following language:

“Some question has been made in argument by plaintiff’s counsel that the question is not properly made by motion. In my opinion I think the question is properly made by the motion. The facts necessary for its determination are embodied in the affidavit filed on behalf of the motion.” See also, page 578.

To the same effect is *Murdock v. Saum*, 26 C.C.(N.S.), 94, in which it is held that the defendant in that case had a right to file a motion attacking the jurisdiction of the justice of the peace, on the ground that the latter was without jurisdiction of the subject-matter of the suit.

In view of the foregoing it is unnecessary for the court to determine whether Section 6308 applies in cases in which the injury occurs in a foreign state though the defendant resides in this state.

The undisputed evidence on the motion being that the plaintiffs are residents of the state of Kentucky, they are not within the class of persons described in Section 6308, and the motions to quash the service of summons is granted in both cases.

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ACTION FOR CANCELLATION OF CERTIFICATES OF STOCK.

Common Pleas Court of Jefferson County.

THE BERTRAM COAL MINING COMPANY v. S. C. BIGGER, WILLIAM
M. JOHNSON, E. R. COLE, W. J. BERTRAM AND
ISAAC BARRICKLOW.

SAME v. E. R. COLE; SAME v. ISAAC BARRICKLOW; SAME v. WIL-
LIAM M. JOHNSON; SAME v. JOHN J. MINKEMYER AND
S. C. BIGGER.

Decided, April Term, 1919.

*Promoters—Occupy a Trust Relation—Like Directors They Must Act
Toward the Corporation with the Utmost Good Faith—Entitled to
Reasonable Compensation—But not to Secret Profits or Profits
Based on an Excessive Valuation—Stock Representing Profits
Wrongfully Taken may be Canceled—Accounting may be Demanded,
When—Application of the Blue Sky Law—Option on Land—Value
of Determined, How—Specific Performance Does Not Lie Against
the Land Owner, When—Cancellation of Stock Issued by the Sec-
retary of a Corporation to Himself.*

1. A promoter occupies a fiduciary relation towards the corporation which he organizes, and to the persons who may afterwards become stockholders. He is thus bound by the same rules and principles as govern other persons acting in a trust relation. He is not allowed to profit by a transaction in which his interest may be inconsistent with the interest of the company he is organizing. So, with a director, he must act towards the corporation in the utmost good faith and manage the corporate business with an eye single to the company's interest, and he can not acquire any profit or reward different from that of any other stockholder.
2. The promoter is entitled to reasonable compensation from the company for necessary services rendered in the organization of the corporation, the benefit of which it has accepted, when rendered under such circumstances as would imply an obligation upon its

*Affirmed by the Court of Appeals with the exception that in case No. 14342 the judgment should be several, and not joint, Par. 4, Syl.

part to pay for the same, but not by way of secret profits or excessive valuation of property turned over to it.

3. Where a promoter takes a thirty day option for the purchase of certain coal lands with a view of speculating therein, and after failure of negotiations with others, organizes a corporation, to which, through a trustee, he turns over the option at twice the value of the lands payable in stock, aided by a fellow promoter who becomes a director and the president of the company and is to share equally with him in the profits, and four other directors, each of whom is also to have a large block of the stock for assisting in the deal and subscribing for a certain amount of other stock, and no disclosure thereof is made to those subscribing for stock, such part of the stock as may represent the profits still in the hands of such defendants, may be canceled at the suit of the company. This, of course, includes the stock delivered to the directors for their part in the transaction.
4. And where, in the organization of the corporation and the allotment of the stock to the several defendants, as set forth in paragraph three, was agreed upon by them in advance, and the action of each was dependent upon the consummation of the transaction, an accounting may be had as against all the defendants for all such stock not now held by them.
5. Whether a corporation complied with the "Blue Sky Law," (Sections 6373-1 to 6373-24 General Code) to enable it to procure a license to sell its stock to the public, is not involved in a case brought by the company against its promoters for cancellation of stock received as secret profits, or as against directors for cancellation of stock delivered to them as compensation pre-arranged for their action in the consummation of the deal.
6. In determining the value of an option for the purchase of land, any objection which might be urged against its enforcement, whether valid or not, is an element to be considered. And where the optionee attempts to "side step" personal responsibility in the matter until after the expiration of the option period, and for that purpose arranges to have his option accepted by an insolvent foreign corporation, equity will not come to the aid of either in specific performance against the owner of the land.
7. Corporate stock issued by the secretary of a company to himself, personally, without consideration, using blank certificates signed up by the president to be used in his absence, may be canceled at the suit of the company.

Kennon & Kennon and D. M. Gruber, for plaintiff.

A. C. Lewis and E. E. Erskine, for defendants.

John D. Gardener, for defendant W. J. Bertram.

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DUNCAN, J. (of Findlay), sitting by designation.

The plaintiff brings these actions to enforce the surrender and cancellation of certain certificates of stock held by the defendants in its corporation. The five cases were heard and submitted together.

On the 27th of July, 1917, the defendants, Bertram and Bigger, took options at the nominal consideration of \$1.00 each for the purchase of six farms, aggregating 702 acres of land, in Muskingum county, this state, at the price of about \$82,000, to be exercised within a period of thirty days. The purchase price in each case was to be paid one-third cash, except one instance, and in that it was to be all cash. They took the options for speculative purposes and not with a view of purchasing the land for their own use. On one of these farms was a small mine with some equipment for deep mining, not then in operation, and on another, what is known as a country mine. These men observed these mines a few days before as they were driving along the public road by automobile on a trip to view another coal prospect which they did not undertake, and consequently, on their way back, went upon this property and took a casual view of the same. Favorably impressed on the next day they took the options in the name of Bertram in behalf of both.

They then began negotiations with one Elkin for the operation of the property on the shares, but failed to consummate a deal. They then began negotiations with the attorney of The Colridge Coal & Coke Co., in an effort to realize something out of them, but later as the options were about to expire and the company had not yet made sufficient examination of the property to determine its value, if any, and pending the investigation, it was arranged with the said attorney, who was also attorney for the Elkin Coal & Coke Company of Wheeling, that he should elect to take the property under the options in the name of the latter company. This was done for the express purpose of avoiding the risk of personal liability of Bertram. This company was a West Virginia corporation, not then in business. It had a capital stock of \$10,000, but had no assets. The options were then turned over to the attorney and on Au-

gust 24th, notice was given in the name of the Elkin Company to the respective owners of the farms of its acceptance under the options, in accordance with the arrangement, but no part of the purchase money was paid. The attorney also gave a written statement to Bertram to the effect that the options were held in trust and that he would turn them over to the Colridge Company in case the deal went through, or to Bertram in the event it failed. Bertram made no written assignment of the options to either of the companies or to the attorney.

The negotiations with the Colridge Company also failed and Bertram and Bigger began to promote a corporation of their own to be known as the Bertram Coal Mining Company, now the plaintiff herein. They procured the defendants, Cole, Barricklow and Johnson, and one Bargar, to become the incorporators the directors thereof with said Bigger, who should be the president, and organized the same with a capital stock of \$300,000, divided into 3,000 shares of \$100 each.

While the said options were taken in the name of Bertram, Bigger all the time had a half interest therein, and it was agreed in advance among all these men that when the company should be organized, Bigger and Bertram should each have \$40,000 of the stock for the options, that the said Cole, Barricklow, Johnson and Bargar should each have \$10,000 of the stock for becoming directors and "backing" or "underwriting" the company, and that \$30,000 of the stock should be held by the company as treasury stock, from which commissions in kind could be paid for the sale of stock.

The articles of incorporation are dated September 1, 1917, and the organization meeting was held September 7th. At this meeting Cole subscribed for 135 shares of the stock, and Barricklow, Johnson and Bargar for 130 shares each. all with the understanding that they should not be required to take and pay for the same, if it could be sold to other people. "Backing" or "underwriting" the company, they say, consisted of these subscriptions which the company could rely upon as an asset.

Soon thereafter, they each paid for 12 shares of the stock and

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a certificate therefor was issued to each of them accordingly. The other stock they subscribed for was sold to other parties. Bigger also subscribed for 5 shares.

At this same time, after the organization of the board of directors, the Elkin Company submitted a proposition to the meeting, according to the arrangement, for the sale of the options to the new company for \$150,000, payable in the stock at par, the plaintiff company to complete and pay for the lands in accordance with the terms of each option, which it did some time after September 7th.

The proposition was immediately acted upon by the board and accepted, the options were turned over and the 1,500 shares of stock were issued to the Elkin Company in accordance therewith, in seven certificates as follows: Two for 400 shares each, four for 100 shares each and one for 300 shares. They were then distributed by the Elkin Company as follows: One to Bertram for 400 shares, one to Bigger for 400 shares, one each to Cole, Barricklow, Johnson and Bargar for 100 shares, and the other to the company for 300 shares as "donated," and the company thus eventually, after the option period had expired, became the owner of the farms by paying something like \$2,000 less than the options called for.

In the discovery of the coal prospect, the taking of the options, and in the promotion of the corporation, the services of Bertram and Bigger were probably worth \$2,000.

On September 15, 1917, the board of directors adopted a resolution electing the defendant Minkemyer a member of the board. At this time he was not a stockholder and no stock was issued to him until October 23rd, when he received a certificate for 10 shares, which he never paid for. He began to attend the meetings September 29th, and soon became active in the affairs of the company. On January 28, 1918, the defendant Bargar resigned as secretary and the defendant Minkemyer was elected in his place. The salary of the office of secretary-treasurer was \$25 per month, but the offices were then separated and the salary of the new secretary was fixed at \$200 per month, and that of treasurer at \$50 per month. The salaries of the other

officers also, were doubled at this meeting. It was the habit of the president, Bigger, to sign up certificates of stock in blank so as to make it convenient for the secretary to issue stock to any person to whom the same might be sold, in his absence, and on February 8th, the defendant Minkemyer issued to himself certificates for 90 shares more, without authority from anyone, none of which was paid for. He attempts to justify his failure to pay for this stock upon the claim that he had an arrangement with the board whereby he was to have 100 shares for his services in the sale of stock, regardless of the amount he sold, but this is not supported by the evidence. There was an understanding, however, that any person selling stock should have a commission of ten per cent. of the amount thereof, payable in stock, but the proof as to the number of shares sold by this defendant, and when he sold the same, is so unreliable that it is impossible to make a finding in this behalf with any assurance of its correctness.

Practically all of the remaining stock was sold to other parties who paid for the same in cash at par, without any information upon their part as to the secret profit of the promoters and the distribution of the first 1,500 shares, and some of it through the positive misrepresentations of Minkemyer as to the foregoing facts, until about the time the new board was elected last October.

The defendants now hold stock in the corporation, thus acquired, as follows: S. C. Bigger, 307 shares; W. J. Bertram, 80 shares; William M. Johnson, 100 shares; E. R. Cole, 100 shares; Isaac Barricklow, 100 shares; John J. Minkemyer, 100 shares.

I might say also that these men had the advice of competent counsel in the promotion and organization of this corporation; that on February 15, 1918, they filed an application with the State Department of Securities for a license to sell its securities, and that the Commissioner issued the company a license thereon. It was stated in the application, among other things, that the company had paid \$80,000 in stock for said property and had paid \$40,000 in stock for "organizing." Under the head of remarks on another page in this statement: "W. J. Bertram

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obtained valuable real estate contracts on lands in Muskingum county. These were assigned to the Elkin Coal & Coke Co. The Elkin Coal & Coke Co. sold all of these contracts to the Bertram Coal Mining Co. for \$150,000 of its capital stock. Out of this \$150,000, the contract provided that \$80,000 should be issued to W. J. Bertram, \$30,000 was donated to the Bertram Coal Mining Co. for treasury stock."

Among the assets, this property was valued at \$161,700. The Department was also informed that it was the intention of the company to pay a commission of 10 per cent. in stock for the selling of stock.

It was the \$40,000 for "organizing" that went to the four directors in accordance with the agreement above mentioned.

There is but little controversy in the evidence except as to the value of the options at the time the plaintiff company took them over. Bertram and Bigger had spent less than three days in the investigation of the property and the taking of the six options. The consideration was but \$1.00 in each case, and they had done nothing to test the prospect, except to drill three or four holes which gave some indication of its value, but this was not of the character or extent to be relied upon for the enterprise. The market value of the lands was then not to exceed \$80,000.

One expert on values testified that the lands were then worth \$225, while another said they were worth \$400 or \$500 an acre. These, of course, were opinions, but the fact is that the options were taken at \$82,000, and that the same were closed up at \$2,000 less after the option period had expired. A farmer living in that locality who had been the assessor for a number of years and the last land appraiser, testified that the six farms were worth \$66,740, an average of \$95 an acre. Actual demonstration favors the opinion of the land appraiser. The value of the options was, therefore, merely nominal.

This, I think, is a fair statement of the facts. Three, however, stand out in bold relief from the others, and to my notion, control and determine the rights of the parties. They are: 1st. The arrangement of Bigger and Bertram whereby they

were to have 800 shares of the stock for these options. 2nd. The arrangement which they had with the four directors through which the action of the board was controlled in the consummation of the deal. And 3rd. The secrecy and camouflage in and by which the arrangement was carried through and the facts concealed from the men who paid for their stock in money at 100 cents on the dollar.

The relation of Bigger and Bertram to this corporation was that of promoters. *The Telegraph et al v. Loetscher*, 127 Ia., 383, 101 N. W., 773; *Hinkley v. Iac. Oil & F. Co.*, 132 Ia., 396, 107 N. W., 629; *Dickerman v. Northern Trust Co.*, 176 U. S., 181, 44 L. Ed., 423. A promoter occupies a fiduciary relation towards the corporation which he organizes, and to the persons who may afterwards become stockholders. He is thus bound by the same rules and principles as govern other persons in a trust relation. He is not allowed to profit by a transaction in which his interest may be inconsistent with the interest of the company he is organizing. So, with a director, he must act toward his company in the utmost good faith and manage the corporate business with an eye single to its interests, and he can not acquire any profit or reward different from that of any other stockholder. 2 Cook on Corporations, 6th Ed., Sections 650, 651, and cases there cited.

The Supreme Court of Massachusetts in *Old Dominion C. M. & S. Co. v. Bigelow*, 203 Mass., 159, 89 N. E., 193, laid down the rule that a promoter may, notwithstanding his fiduciary relation to the corporation, sell property to it; but that to make the sale binding he must provide an independent board of officers, not directly or indirectly under his control, and make full disclosure to the corporation through them, or make a full disclosure of all the facts to each original subscriber of corporate stock, or procure a ratification thereof, after full disclosure, by vote of all the stockholders. But Bigger and Bertram, instead of providing a board that could and would exercise an independent judgment, Bigger became a director himself, and by their procurement the four others were elected to whom the additional block of 400 shares was to be divided, dependent upon the deal going through.

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In contrast with this procedure, I quote the following from the opinion of Judge Donahue, in *Thomas v. Matthews*, 94 O. S., at page 43:

“It is the settled law of this state that directors must manage the corporate business with a view solely to the common interest, and can not directly or indirectly derive personal profit or advantage from their position which is not shared by all the stockholders.”

“The maxim, *uberrima fides*, of the civil law applies without limitation or restriction to their relation to the corporate property and business. They occupy a strictly fiduciary relation to the stockholders and are accountable to them on principles governing that relationship.”

So that, there is a double ground for challenging this transaction. One is the relation of Bigger and Bertram as promoters, and the other, that of Bigger as a director contracting with himself, aided by the four other self-serving directors looking to him for their reward.

In the organization of the company it was the duty of the promoters not only to faithfully disclose all facts touching the character and value of the property to be turned over, but also their personal interest in the proposed sale. The opinion in the *Loetscher case*, *supra*, quotes with approval from the opinion of the Lord Chancellor when speaking of the duties and obligations of promoters. Believing the doctrine salutary and applicable to the facts of this case, I quote the same here:

“They stand, in my opinion, undoubtedly, in a fiduciary position. They have in their hands the creation and molding of the company. They have the power of defining how and when and in what shape and under what supervision it shall start into existence and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchasers of the property of themselves (promoters), it is, in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive (that is to say, with a board of directors) who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges

as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint-stock company, and then sell his property to it; but I do say that if he does he is bound to take care that he sells it to the company through the medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person."

I also quote from the opinion in the *Hinkley case*, *supra*, dealing with an aspect common to this case:

"The 10 men who planned and organized the defendant company were promoters, within the meaning of the law. The *Telegraph v. Loetscher*, 127 Iowa, 383, 101 N. W., 773. A promoter is a person who brings about the incorporation and organization of a corporation. This was done by all of them, and with a specific design to defraud any of the public whom they might be able to induce to subscribe for stock. Those of them who were called as witnesses candidly admitted that the scheme adopted at the preliminary meeting was to engage in some enterprise, the costs of which and of its development should be paid solely from the proceeds derived from the sale of stock to others, should cost them nothing, and that enough stock should be issued to themselves so that in event of success they would manage and control of the affairs of the corporation. In other words, the plan contemplated: (1) That in event of failure the entire loss should fall upon their neighbors; and (2) that in event of success they would appropriate to their own use without any consideration whatever more than one-half of the profits and property acquired. That this was a conspiracy to defraud the public is not open to doubt. As promoters these men stood in a fiduciary relation to the company to be organized and those who should subscribe for its stock. As such they were bound to act in good faith and to deal with them in perfect candor."

"In pursuance of the scheme these promoters elected eight of themselves, including Petersmeyer, directors, and in serving as directors all agree that everything was done in accordance with the plans originally made. The first act of the board was to undertake and to so manipulate the stock that it could be said to be 'fully paid.' But Smith, as he was both promoter and director, might not acquire a secret advantage for himself or others lawfully. He merely transferred the contract, which had

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cost him nothing and was without value, and received the stock without consideration. Of this he distributed about 185,000 shares to himself and the other nine promoters gratuitously. They then proceeded to dispose of the treasury stock to whomsoever could be induced to buy at 25 cents per share and a portion of the 39,000 shares at from 6 to 10 cents a share. Those who bought had the right to assume, in the absence of knowledge to the contrary, that all other stockholders were paying the same price for stock issued as that they were contracting to pay."

A case similar to the one at bar is *Yeiser v. U. S. Bd. & P. Co.*, 107 Fed., 304, an Ohio case decided by the United States Circuit Court of Appeals at Cincinnati in 1901. The opinion is by Severens, Circuit Judge, and is concurred in by Judges Lurton and Day, afterwards on the Supreme Court of the United States. Two of the defendants took an option on a manufacturing plant at the price of \$75,000 and turned the property over to the corporation, which they organized for the purpose, and of which they were directors, at the price of \$100,000. A majority of the stockholders had no knowledge of the price actually paid, but supposed it to be \$100,000, until the company had taken possession and was operating the plant, when other officers were elected and suit was brought for cancellation of the stock paid for with the profits of the transaction. Held that, under the circumstances shown, the benefit of the purchase made by the holders of the option inured to the company, regardless of the actual value of the property, and that, since the purchase from them could not be rescinded without great injustice to the company, the cancellation of the stock as prayed for was an appropriate remedy.

"It is a well-settled principle of equity," says Judge Severens at page 344, "that those who participate in bringing about the organization of an incorporated company, and in getting it in condition for transacting the business for which it is organized, assume the obligations of a trust towards the company and those who shall be invited to come into the enterprise as stockholders and share in its fortunes. The latter have the right to rely on the good faith and fair dealing of those who have promoted the company and to assume that they have not perverted the

organization by secret means to the accomplishment of selfish purposes, and the destruction of that equality of right which, in the absence of some known modification, all the shareholders are entitled to enjoy.

“The reasons for the enforcement of that principle in such cases as this are obvious. Without it there is nothing to hinder the concoction of schemes which the reports of decisions show are becoming quite too frequent in recent years, during which corporations have so greatly multiplied, whereby one may take an option or conditional contract for the purchase of property, and then turn it over, at a profit to himself, to a corporation to be organized, and be under his own control for a sufficient time to enable him to realize the fruits of his enterprise. Unless the promoter of a company is restrained by the obligations of a duty which prevents him from bringing the consequences which are liable to result to others who may be led into danger, he may practice such schemes with impunity.”

Hayward v. Leeson, 176 Mass., 310, 57 N. E., 656, is another case very similar to this. The promoters, subsequent to the creation of the corporation and while they were the sole stockholders, voted to issue the corporate stock to themselves in payment for services rendered before the company was organized, in securing options on land which they assigned to the company. Thereafter the promoters invited the public to subscribe to the stock, without disclosing those facts and getting their consent to the transaction. The court held that the promoters were guilty of fraud and that the company could maintain an action for the recovery of the stock, without returning the lands acquired under the options.

The distinction between that case and this is that the purpose of forming the corporation was conceived before the options were taken, while here the options were taken for speculative purposes and their final use was decided upon afterward. The options were sold in each case, that is, that was the appearance, but there the court say: “Really this \$700,000 of paid-up stock was issued to the promoters as remuneration for their services as promoters.”

The suit was instituted to charge the defendants with “secret profits made by them as promoters and not on the ground that

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the stock subscribed had not been paid for under the laws of Tennessee.” In this behalf the court say: “Whether it was or was not properly issued as paid up stock so far as a compliance with the statutes were concerned, is not material, and we express no opinion upon that point.” It was because “they stood in a fiduciary relation to the future shareholders of the corporation, and by reason thereof could not receive any remuneration for their services as promoters of that corporation without making full disclosure thereof and obtaining the consent of those shareholders thereto.”

And after quoting at length from the opinion of Judge Sevens in the Yeiser case, *supra*, the Circuit Court of the Sixth Circuit in *Shawnee Bank v. Miller*, 1 O.C.C.(N.S.), 569, lays down the rule that those who participate in the organization of an incorporated company and enter the board of directors occupy a fiduciary relation thereto, and that where such promoters and directors urge the sale of property to the corporation at three times its real value, and vote for its purchase with full knowledge as to its actual value, there is such a lack of good faith toward the corporation, its stockholders and creditors as to constitute a fraud *per se*.

See also generally, *Toodin v. Canal Co.*, 18 O. S., 169, 183; *Gates v. Tippecanoe Stone Co.*, 57 O. S., 70; *Wills v. Nehalem Coal Co.*, 96 Pac., 528; *Lomita L. & W. Co. v. Robinson*, 154 Cal., 36, 97 Pac., 10; *See v. Heppenheimer*, 61 Atl., 843; *Johnson v. Sheridan*, 93 Pac., 470; *First Nat. Bk. v. Hildebrand*, 79 N. W., 753; *Klein v. Ind. Brew. Co.*, 231 Ill., 594; 83 N. E., 434; *Nickerson v. English*, 142 Mass., 267, 8 N. E., 45.

The cases cited in behalf of the defendants are based upon an entirely different state of facts. The promoters either owned the property, or had closed the option by contracting to take it and turned the same over after full disclosure of all facts affecting its value and their personal interest in the transaction, as was their duty in the premises. Here, as already explained, there was no such disclosure, except to those who were, under the arrangement, to participate in the secret profits of the transaction. Neither Bertram nor the Elkin Co. owned the property

or had any interest therein, and it is very doubtful whether either had any interest in the options which could be enforced.

Options were defined by our Supreme Court in *Breuing Company v. Maxwell*, 78 O. S., at page 63, as "merely contracts by which one party in consideration of the payment of a certain sum to the other party, acquires the privilege of buying from or otherwise acquiring, or selling to such other party an interest in specified property at a fixed price within a stated time." And in *Longworth et al v. Mitchell*, 26 O. S., 334. it is held that "where a party makes an offer to sell on specified terms, giving the proposed purchaser the option to accept the terms within a limited period, time is to be regarded as of the essence of the offer, and an acceptance of the terms after the period limited will not be binding." Accordingly, some authorities hold that in order to make the acceptance binding upon the optioner, it is necessary to tender the cash payment called for in the option before the expiration of the option period and thus make the contract of mutual obligation. That is to say, before the acceptance is complete, tender of the cash payment must be made. *Steel v. Bond*, 32 Minn., 14, 18 N. W., 830; *Bostwick v. Hess*, 80 Ill., 138; *Coleman v. Applegrath*, 68 Md., 21, 11 Atl., 284. This, however, has not been decided in Ohio, and is not in accordance with the weight of authority in this behalf. *Watson v. Const et al*, 35 W. Va., 463, 14 S. E., 249; *Breen v. Moyne*, 141 Ia., 399; 118 N. W., 441; *Levy v. Lyon*, 153 Cal., 213, 94 Pac., 881.

There is also some question as to whether it was necessary, under the statute of frauds, that the assignment from Bertram to the Elkin Company should have been in writing. It is claimed and it would seem reasonable to hold that if it was necessary for the owner to enter into a writing to grant an option to purchase his lands, it would also be necessary for the optionee to execute a written assignment to transfer the right to another, but I am not prepared to say that this is the law, nor is it necessary for the solution of this case. These facts, however, would ordinarily be taken into consideration by competent business men, independent of any domination or self interest, moved with an eye single to the interests of the trust which they might represent.

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But however these two questions affecting value might be determined when directly in issue, I am quite sure that the Elkin Company could not enforce specific performance of the option contracts if for no other reason, because it was not the real party in interest. And Bertram could not because he made no effort to accept them at any time, and for the further reason that he attempted to "side step" personal responsibility by arranging to have the same done by an insolvent foreign corporation. Equity will not come to the aid of a plaintiff in specific performance of a contract, who, until after the expiration of the option period, has sought to avoid the obligation upon his part which forms the consideration essential to make the contract binding.

Though promoters are entitled to compensation for necessary services rendered in the organization of a corporation, the benefit of which it has accepted, 2 Thompson on Corporations (2d Ed.), Section 89, *Farmers' Bank v. Smith*, 105 Ky., 816 (49 S. W., 810), *Railroad Co. v. Cristy*, 79 Pa. St., 54, it must be reasonable and commensurate with the services performed and paid as such, and not by way of secret profits or excessive valuation of property turned over or sold to the corporation. And finding that the services performed by Bigger and Bertram were necessary to the organization of the corporation, and that they were rendered under such circumstances in the absence of the secret profits arranged for, as to imply an obligation upon the part of the company to pay them therefor, I am inclined to allow them the sum of \$2,000 as such compensation.

Whether any license issued by the Commissioner of Securities to sell the stock of a company under what is known as the "Blue Sky Law," Sections 6373-1 to 6373-24 of the General Code, is a defense against the claim of persons buying the stock relying thereon, is not involved in this case. This law is "a regulation of business, constrains conduct only to that end, the purpose being to protect the public against the imposition of unsubstantial schemes and the securities based upon them." *Hall v. Geiger-Jones Co.*, 242 U. S., 539, 61 L. Ed., 480. It operates between the company and the state for the protection

of the public and it does not extend to schemes of designing promoters who attempt to profiteer the company itself.

The organization of the corporation, the issuance, manipulation, and sale of its stock, involving breaches of duty both as promoters and directors, were in accordance with and steps in the execution of the scheme by which Bigger and Bertram and their four directors were enabled to defraud the company and those who might subscribe and pay for their stock at a hundred cents on the dollar. A part of the means as well as the object was fraudulent, it amounted to a conspiracy to defraud, and the the participators therein are liable therefor, both jointly and severally, and the company is entitled to an accounting against all of them for the amount of the stock disposed of by them, or any of them, before the commencement of this action.

The order will be that each of the defendants surrender to the clerk of this court the certificates of stock so held by him and that the clerk deliver the same to the secretary of the plaintiff company for cancellation. This applies to all the cases.

It is further ordered in case No. 14342 that for the 93 shares disposed of by the defendant Bigger, and the 320 shares disposed of by the defendant Bertram, that the plaintiff recover from all the defendants in that case the sum of \$41,300 as the value of said stock, provided, that if before the filing of the entry herein any of said stock so disposed of by said Bigger or Bertram should be surrendered for cancellation, the same shall reduce the judgment to the extent of the par value thereof. Exceptions. Notice of appeal.

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ALLEGATIONS WITH REFERENCE TO A WILL AND CODICILS.

Court of Common Pleas of Clark County.

HAZEL G. TRULL V. MARY J. V. PATRICK, EXECUTRIX, ETC.

Decided, January 19, 1920.

Wills—Allegations to a Will and Two Codicils Without Reference to the Validity of a Third Codicil—To What the Verdict of the Jury Should Respond.

1. When a petition alleges that a will and two codicils of a decedent are not his valid last will and codicils, a motion to amend the petition, made more than a year after the probate, so as to attack a third codicil should be overruled.
2. Under the allegation that a will and two codicils are invalid, the validity of a third codicil, not mentioned in the petition, but which republishes the will as of the date of such last codicil, may be contested.
3. The proper issue to be submitted to the jury is whether or not the writing produced is the valid last will and codicils of the decedent and the verdict of the jury should respond to this issue in reference to the will and to each of its several republishing codicils, whether such codicils are mentioned in the petition or not.

Zimmerman & Zimmerman and Chase Stewart, for the plaintiff.

John M. Cole, for the defendant.

GEIGER, J.

The plaintiff in her petition alleges the death of Charles E. Patrick and that on the 22nd day of October, 1917, a paper writing purporting to be the last will and testament of the said Patrick, dated May 10, 1913, and two codicils dated, respectively, May 13, 1913, and April 20, 1915, were admitted to probate; that said paper writings are not the last will or the codicils of said Patrick. Plaintiff prays that an issue be made up as to whether such paper writings are the last will and codicils of said decedent.

On December 10, 1919, a motion was filed to amend the petition by inserting such facts as would disclose that there was a third codicil to said will, dated August 11, 1915, but not mentioned in the petition. The will and codicils having been probated on the 22nd of October, 1917, more than a year had elapsed before the filing of the motion to amend the petition and counsel for defendant urged that under the provisions of Sections 10531 and 12087, G. C., limiting the time in which a contest of a will may be begun, the plaintiff can not amend her petition so as to raise an issue as to a codicil not mentioned in the petition.

The court overruled the motion on the ground that if it was necessary that the third codicil be mentioned in the petition before it could be attacked as invalid, the time in which such action might be taken had expired, and that if such an attack might be made under the petition as filed, it would not be necessary to amend the petition so as to mention the third codicil.

Counsel now apply to the court to make up the issue, as directed by Section 12087, which provides "an issue must be made up either by pleadings, or an order on the journal, whether or not the writing produced is the last will and codicil of the testator, which shall be tried by a jury."

The will of the testator, with the three codicils appended, were all written on the same sheet of paper and were probated at the same time under the following order of the court:

"Whereupon, the court finds that the foregoing instruments of writing are the last will and testament and the codicils of said Charles E. Patrick, deceased. * * * It is therefore by the court ordered that said will and codicils be admitted to probate."

The third codicil, which was not mentioned in the petition, and concerning which the controversy now arises, was dated on the 11th day of August, 1915, and is as follows, except the attestation:-

"I, Charles E. Patrick, do hereby declare this paper writing to be a codicil to my last will and testament bearing date of May

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10th, 1913. I hereby revoke Item 7 of my said last will and testament, and hereby confirm and ratify my said last will and testament and codicils thereto, in all other respects.”

It is claimed by the defendant that the third codicil was a separate testamentary act of the testator, and that thereby he confirmed and ratified the will bearing date of May 10, 1913, and that said ratification made a new testamentary disposition of his estate as of the date of the codicil.

“A properly executed codicil, which is attached to a will, or which refers to it specifically as by its date and contents, acts as a republication of the will as of the date of the codicil.”
Page on Wills, Sec. 307.

The position urged by counsel for defendant is that the plaintiff not having made an attack specifically upon the third codicil to the will, and such codicil having confirmed and ratified the will by proper designation, the will by such confirmation and ratification becomes a valid testamentary instrument, binding from the date of the probate, and that therefore even though the plaintiff successfully attack the will and the two codicils specifically mentioned in her petition, the will and the two codicils must stand because ratified and confirmed by the subsequent codicil not mentioned specifically in the petition.

On the other hand, it is urged by counsel for plaintiff that in as much as the issue that must be submitted to the jury is “whether or not the writing produced is the last will or codicil of the testator,” that the will and all the codicils attached thereto, may be attacked, even though one of the codicils be not specifically mentioned.

It must be conceded that a party wishing to attack a testamentary instrument, would have the right under the statute, to attack one or more of the codicils without involving the validity of the will itself, and it is urged that conversely, he may attack the will itself without attacking a codicil appended thereto.

It must also be conceded, even though an attack upon a will and some of its codicils be successfully made, that if there is a

subsequent codicil confirming and ratifying the will, which is not successfully attacked that the valid codicil makes good the will which was successfully attacked.

If the will is republished by the valid codicil, it is valid, no matter what defects may have originally existed in its execution. Page on Wills, Section 311.

It is first, of interest to determine the exact relation of a codicil to a will. Section 10502 of Chapter Two, relating to the execution and probate of wills, provides:

“In this title, the term ‘will’ includes codicils.”

However, this statutory definition is in a measure modified by Section 12079, in the Chapter relating to contests of wills, which provides:

“A person interested in a will or codicil admitted to probate,” etc.

These two sections indicate that as to the execution and probate of wills, the term “will” should include codicil, but that in the Chapter relating to contests, the two may be regarded as separate testamentary dispositions.

Hitchcock, Judge, delivering the opinion of the court, in the case of *Negley v. Gard*, 20 Ohio, 315, says:

“In construing a will, to which are attached or added codicils, the whole is to be taken together as one instrument. The codicils constitute a part of the will.”

In the case of *Collier v. Collier*, 3 O. S., 269 Ranny, J., at page 373, says:

“In endeavoring to elicit the intention of the testator, the will and codicils must be read and considered together”—citing *Negley v. Gard*, and quoting Chancellor Kent.

These rules are laid down in reference to construction of wills, and not to their contest.

In the will now before the court, the third codicil disposes of no estate, except as it refers back to the body of the will.

Section 12082 provides that an issue must be made up, wheth-

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er or not the writing produced is the last will or codicil of the testator. This section is discussed at large in the case of *Dew v. Reed*, 52 O. S., 519, wherein it is held that rules of pleading under the Code, when inconsistent with the statutory provisions relating to contests, are inapplicable; the action must be conducted in conformity with the special proceedings.

“The issue to be made up and tried in such actions having been prescribed by the statute, can not be varied or restricted by averments in the pleadings, but must be the same, whether made up by the pleadings or by an order on the journal of the court: viz.: ‘whether the writing produced is the last will or codicil of the testator, or not.’ ”

It is further held that upon the trial of that issue any competent evidence tending to prove that for any reason the instrument in contest is not the valid will of the testator, is admissible and should receive proper consideration by the jury, although the specific ground of contest to which the evidence relates, is not alleged in the petition.

Whether the issue be made up by the pleadings or the order of the court, it must be the broad issue required by the statute, whether the instrument produced is the valid will of the alleged testator, and as the proof may be commensurate with the issue, any competent evidence tending to prove that for any reason it is not his valid will, is admissible.

The principles of this case declare the rules that should control the admission of the testimony in the trial of the issue made.

It is only necessary that the petition seeking to contest an instrument, allege that the same is not the valid last will and testament of the decedent, to permit the introduction of any evidence that will assist the jury in determining the issue thus made.

It must follow, in the case at bar, that in as much as the plaintiff's petition has plead that said paper writings are not the last will and testament, nor the codicils of the testator,

that she may introduce any evidence that will enable the jury to arrive at a proper verdict upon this issue. It must further follow that upon the trial, the plaintiff may introduce evidence showing the lack of testamentary capacity of the testator, both at the time he made the will, and at the time he made the first and second codicils. If the plaintiff stopped at that point, she would necessarily fail, even though she may have specifically mentioned the third codicil in her petition. If she was successful in showing the lack of testamentary capacity at the time of making the will, and at the time of making the first and second codicils, she could not be excluded from the right to attack the third codicil, by showing lack of testamentary capacity, even though the third codicil were not specifically mentioned in the petition, for the reason that she has the right to introduce evidence bearing upon the issue made by the entry, and clearly it would be pertinent to that issue to show that the will and the first and second codicils, which may have been successfully attacked, were not re-established by the third codicil.

The court is clearly of the opinion that even though the plaintiff had attacked only the will, without mentioning either of the codicils, that under the issue made she would have the right to show that at the time of executing the codicils, the testator was without testamentary capacity, because the ability of the testator to make valid his will executed at the time he was without testamentary capacity by subsequent re-publication through the codicils, would depend on whether or not at the time he made the codicils, he had testamentary capacity.

The attack by the plaintiff upon the will necessarily requires her to attack the subsequent codicils confirming and ratifying that will, and she must do that under the issues made, even though her original attack was upon the will alone.

See also, *Stacey v. Cunningham*, 69 O. S. 176; *Kilpatrick v. Humphrey*, 8 O. N. P., 245; *Haynes v. Haynes*, 33 O. S., 598; *Brown v. Griffith*, 11 O. S., 329.

The court would be quite content to let the issue go to the jury as to whether or not the will and the first and second

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codicils thereto, were the valid last will and codicils of the testator, and under such issue permit the plaintiff to introduce testimony showing the lack of testamentary capacity of the testator at the time he made the third codicil, as throwing light upon the issue so made, but the court is invited and urged, and it becomes his duty to make the issue by a journal entry.

The probate of the will and its three codicils was a single proceeding, resulting in a single order of the court, and the statute—Section 10525—provides that when it is admitted to probate, the will, which under that chapter would include the codicils, shall be filed and recorded, and Section 10534 provides that when the probate court receives from the clerk of the common pleas court the certificate that a petition has been filed to contest the validity of the will admitted to record, that the probate court shall transmit the will, the testimony, and all papers relating thereto, with a copy of the order of probate.

These sections in reference to the probate of a will, including as they do the codicils, seem to the court to make up the writing which is to be produced, and this notwithstanding the fact that it may be conceded that the plaintiff may have attacked a single codicil without attacking the will, in which event the jury could find that the will was a valid last will, but the codicil thereto was not.

In the case of *Chilcote, Guardian, v. Hoffman*, 97 O. S., 98, at the bottom of page 107, Donahue, delivering the opinion of the court, says in reference to the statutes touching upon contests:

“This is a remedial statute and must receive a liberal interpretation.”

This invites the court to a liberal interpretation of the statutes, notwithstanding the statement of Matthias in the case of *McVeigh v. Fetterman*, 95 O. S., 292, that no right exists to maintain an action to contest a will, except as it is specifically provided by statute, and the right thus conferred is subject to the conditions and limitations imposed.

The court is therefore of the opinion that the proper issue to submit to the jury is whether or not the writing produced is the valid last will and codicils of the testator, and that under such issue the jury should have submittel to it all evidence bearing either upon the execution of the will or of any of the codicils, and that the verdict of the jury should respond to this issue in reference to the will and to each of its several codicils.

It would be impossible to submit the issue of the validity of the will to the jury without submitting to it the issue as to the validity of its several codicils, each of which republished the will as of its date.

PARTITION OF LAND SUBJECT TO DOWER INTEREST.

Common Pleas Court of Richland County.

ANNA M. LAPE, GUARDIAN OF RUBY M. LAPE, AND C THERINE E.
LAPE, v. RUBY M. LAPE ET AL.

Decided, March 5, 1920.

Partition—Unassigned Dower Not a Bar Thereto—Right of Dower Not an Estate but a Right of Action.

1. A widow's dower estate in the lands of her deceased consort is not such an interest under the Code of Ohio as forbids or prevents a partition of such land.
2. In such lands subject to a widow's dower estate unassigned, the heirs at law of the deceased consort have a partitionable interest and can bring and force partition against the widow.

Edwin Mansfield and Reed & Beach, for plaintiff.

C. H. Workman, for defendants.

GALBRAITH, J.

This action was brought by the guardian of minor grandchildren of William Lape, deceased intestate, against said deced-

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ent's children, widow, and other grandchildren for partition of certain land of said decedent and for an accounting, plaintiff's wards' father, through whom they claim, being also deceased.

To the first cause of action of the amended petition, a demurrer is interposed on behalf of defendant, Sarah A. Lape.

Such cause of action alleges that Sarah A. Lape is the widow of William Lape, deceased, and is entitled to dower in the premises.

The first ground of demurrer is "general"; the second ground asserts: "Said first cause of action in said amended petition does not set up a partitionable interest in the plaintiff or her wards in the premises described in the said amended petition."

The amended petition attempts to, and possibly does, follow a usually accepted form, although to a careful pleader it may seem deficient in some respects.

However, the attorney for demurrant asserts that he seeks to raise the single question, Have heirs the right to have partition where there is an existing dower interest in the entire property?

He contends that a widow's dower right is an estate for life against which remaindermen can not have partition; and he asserts that there is no reported decision in Ohio which determines this question either way, but that Ohio courts have ruled both ways.

From nearly a quarter of a century's practice, and a greater period of connection with the courts, this court can say that in this county and in some other counties of this state, from personal experience and observation, it has never known the question to be answered other than in the affirmative, and as a matter of adopted practice this court would hold, without memoranda, that the demurrer is not well taken and should be overruled; but, on request of counsel, the court will endeavor to set forth on principal and authority why such ruling is correct.

Counsel for demurrant cite and comment on G. C. of Ohio, Sec. 12026 2 O. S., 207, 16 O. S., 218, 89 O. S., 113, 30 Cyc., 180, G. C. of Ohio, Secs. 8606, 8616, 12005, 12018, and 12019, also 112 Mass., 42, and 32 Iowa, 399.

Counsel for plaintiff cite and comment on G. C. of Ohio, Secs. 12042, 12043 and 16 O. S., 218.

Reference will be made to such citations, as the court thinks applicable, hereafter, in the course of this opinion.

Is a dower right, unassigned, or dower estate as commonly referred to, a life estate in its technical legal acceptation?

Estates—Definition:—"An *estate* in land is the degree, *quantity*, nature, or extent of interest which a person has *in* it. In its primary and technical sense the term 'estate' refers only to an interest in land." 16 Cyc., 599.

Classification:—"A"—"Estates are classified (1) with regard to the *quantity* of interest which the tenant has *in* the tenement: (2) with regard to the time at which that *quantity* is to be enjoyed; and (3) with regard to the number and connections of the *tenants*."

"B"—"With regard to the *quantity of interest* which the *tenant has in the tenement*, estates are classified as estates of freehold and estates less than freehold." "An estate of freehold, in an estate of inheritance or for life in real property." 16 Cyc., 601.

"Freeholds not of inheritance are estates for life only." "Estates less than freehold are of three sorts:—Estates for years, estates at will, and estates by sufferance." 16 Cyc., 605.

"An *estate for life* is a freehold interest *in* land, the duration of which can not extend beyond the life or lives of some particular person or persons, but which may possibly endure for a period of such life or lives. Estates for life are either conventional, which are created by the acts of the parties; or legal which are created by construction and operation of law." 16 Cyc., 614.

Ohio decisions have declared that a life estate is a freehold estate. 9 Dec. Rep., 302, 12 Bull., 119, 20 N. P. (N.S.), 317, 15 O. D. (N. P.), 129.

In Ohio a conventional estate for life to a wife may be created by deed or will; legal estates for life may arise by operation of law—by statute, such as under G. C. of Ohio, Sec. 8573, Cl. 2.

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“Descent or hereditary succession is the title *whereby a person on the death of his or her ancestor, acquires an estate, by right of representation, as an heir at law.*” (Blackstone.) *Freeman v. Allen*, 17 O. S., 527.

“Descent is what takes place when land or some interest in land, or other realty belonging to a person, passes on his death intestate to some *one related to him.* (Rapalje & Lawrence Law Dictionary.)” *Spangenberg v. Guiney*, 20 N. P., 39; S. C. 5 O. D. (N. P.), 163.

“At common law an ‘heir’ is defined to be ‘one who is born or begotten in lawful wedlock, and upon whom *the law casts the estate* in lands, tenements or heritaments, *immediately upon the death of the ancestor.*” *Assn. v. Pollard*, 3 O. C. C., 577; 2 O. C. D., 333.

“An heir at common law is one who, after his *ancestor’s* death, has a right to inherit all the intestate’s estate. *Ober v. Hickox*, 19 O. C. C., 42; 10 O. C. C., 128.

Strictly speaking, or technically, a surviving husband or wife is not an heir of the other, in Ohio.

By the laws of descent of Ohio, an *intestate’s real estate passes to his children, or their heirs, or in the absence of such heirs, to others specially designated by statute.* G. C. of Ohio, Secs. 8573, 8574 *et seq.*

Their right to such property, however, being subject to a lien or incumbrance—dower—in favor of decedent’s widow, if one survives, which right of dower is established by statute—G. C. of Ohio, 8606.

The present wording of this statute is as follows:

“A widow or widower who has not relinquished or been barred of it, shall be endowed of *an estate for life* in one-third of all the real property of which the deceased consort was seized as an estate of inheritance at any time during the marriage, etc.”

The court has italicised the words upon which, possibly, demurrant largely bases his contention.

Prior to the last amendment this statute read:

“That the widow of any person dying *shall be endowed* of one full and equal third part of all the lands, tenements, and real estate of which her husband was seized as an inheritance at any time during the coverture, etc.” See 55 O. L., 24, Sec. 1; 1 S. 7 C. R. S., page 516.

Dower right is a statutory right. It does not rest upon any right of contract between the parties; and is entirely subject to legislative control. Rockels Probate Pr. Sec. 943; 6 O. S., 547; 140 F. D., 364.

Dower is not a freehold estate—“Prior to the assignment of her dower the widow has no vested free-hold estate under the common law, she is not seized of any part of her deceased husband’s lands, but her right is for most purposes nothing more than a right of action.” 14 Cyc., 960-1.

“Since the right of dower before assignment is *not an* estate, but a mere right of action, the widow can not maintain an action for partition against her husband’s covenant.” 14 Cyc., 961.

“*Until the assignment of dower a widow has no right under her claim of dower to enter and occupy any portion of her husband’s estate, unless such right is given by statute.*” 14 Cyc., 962.

“Dower unassigned is a mere right of action, and nothing more.” *Rayner v. Lee*, 20 Mich., 384, 386.

“Dower before assignment is purely an equitable right, which confers no specific estate or interest in the land that can be sold or assigned. *Turnipseed v. Fitzpatrick*, 75 Ala., 297, 303 (citing *Barber v. Williams*, 74 Ala., 331).”

“The right of dower in a married woman is a mere intangible, inchoate, and contingent expectancy, and even in a widow, until it is assigned, it is no estate in the land; but it is a right resting in action only, and can not be aliened. *Blain v. Harrison*, 11 Ill. (1 Peck), 384, 385; *McNeer v. McNeer*, 32 N. E., 681, 683, 142 Ill., 388, 19 O. R. A., 256.”

“Until there is an actual admeasurement of the dower, it is

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a mere potential interest, amounting to nothing more than a chose in action, and is not subject to seizure and sale by execution at law. The wife has no interest or estate in the lands, and her deed operates, not as a grant, but as an estoppel." *Traders' Ins. Co. v. Newman*, 22 N. E., 428, 430, 120 Ind., 554.

"While it is true that the wife's inchoate right of dower is a mere intangible expectancy, and is not, strictly speaking, an estate in land, and does not even rise to the dignity of a vested estate, it is a valuable right, which the law will protect as possessing elements of property." *Morgan v. Wickliffe* (Ky.), 70 S. 8., 680, 681 (citing *Helm v. Board* (Ky.), 70 S. W., 67 ; *Petty v. Petty*, 43 Ky. (4 B. Mon.), 215, 39 Am. Dec., 501).

"Dower is not an estate in land, vested or otherwise. It is a right without value, unless by some modern methods a possibility may be valued. A possibility or contingency is not an estate. It may be affirmed generally, where a right is given by law, until that right becomes vested in some way in property, the law may be changed or repealed, and the right taken away. Dower does not become a vested right in the wife until the death of her husband. A possibility of dower is no vested right in the estate of dower, or anything the law recognizes as property." *Richards v. Bay Land Co.* (U. S.), 54 Fed., 209, 211, 4 C. C. A., 290.

"Dower is not an estate in land, vested or otherwise." *McKelvey v. McKelvey*, 89 Pac., 663, 666, 75 Kans., 325, 121 Am. St. Rep., 435.

And Ohio courts have held:

"Dower is a *claim* flowing from marriage." *Dunseth v. Bank*, 6 O., 76.

"Dower inchoate is not an estate; it is a *right*, or interest, in the husband's land *created by law* for the wife's benefit. It is contingent upon the wife surviving the husband. It then *ripens into a right that she may demand and have it assigned to her*." *Dukes v. Dukes*, 4 O. C. C., 510; 2 O. C. D., 676.

"Dower is not an estate until assigned." *McArthur v. Franklin*, 16 O. S., 193.

"A dower interest of either husband or wife under G. C.,

8606 and 8607, is of the same character as the wife's dower was previously; the word 'estate' (used in the amendment) does not change it." *McClaren v. Stone*, 18 O. C. C., 854; 9 O. C. D., 794.

In the opinion of this court the words "an estate for life in" were inserted in the last amendment of our dower statute to specially indicate the time of the continuance or duration of the dower right, rather than to establish it as an "estate" in the property to which it attaches.

The interest of a dower estate, or right, as it existed, and as recognized before our act was amended, or in fact passed, was an interest that was to be set apart to the widow for her support, by meets and bounds—one-third of the land of the decedent; if that could not be done then she was to have set off to her a certain portion of the rents and profits.

Of cases cited by demurrant—The Tabler case in 2 O. S., 207, by Judge Ramsey, presents a different question than the case at bar.

In that case the whole of the land sought to be partitioned had, previously, been assigned to the widow as her dower.

In the opinion the court cites, among other cases to like effect, the case of *Brown v. Brown*, 8 N. H., 93, in which the court said "No case is to be found that gives the slightest countenance to the supposition, that, *where several are interested together in a remainder, after a freehold estate*, any of them can maintain a petition for partition of the land in which they are so interested.

The court in the Tabler case, undoubtedly, based its conclusion that there was no right to partition upon the supposition or theory that the dower interest of the widow constituted a life estate—a freehold, although the court did not so state in express words.

In view of the numerous authorities heretofore cited I am of the opinion that if such was the basis of the court's conclusions it was wrong; but, as said before, the existing interest of the widow in such case was different from that of the case at bar

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and from a careful reading it appears that such case does not sustain demurrant's contention in this case.

The Fritz case, in 16 O. S., 218, was not admitted for general hearing and disposition by the Supreme Court. It is an overruling of motion for leave to file petition in error to the district court which had affirmed the common pleas on the sustaining of demurrer of a widow—dower tenant—to an action for partition by brothers or nephews, after the widow had elected not to take under the husband's will—he leaving no children. After such election the widow, under the statute, would only take as though her husband had died intestate and left children—a dower estate.

No authorities, upon which the court's ruling is based, are cited. The facts are meagerly set forth,

This court must assume, in the absence of any showing to the contrary, that the action of the court in this case was based upon the authority of the Tabler case, and that for the reason already stated this case does not sustain demurrant's contention.

In the Eberle case, 89 O. S., 118, the facts disclose the existence of an unquestioned *life estate created by will*, accepted by election, consequently the remaindermen had no right to partition during the continuance of the life estate."

While this case approves the principal of the Tabler case it does not necessarily approve the facts upon which the last mentioned case was decided, *i. e.*, that a dower interest, unless assigned and covering the entire property, constitute a life estate, and for reasons heretofore suggested, to the mind of this court it does not sustain demurrant's contention nor apply to the conditions of the case at bar.

Undoubtedly demurrant herein had all of the rights authorized by G. C., 12005, 12018 and 12019, but so far as the matter now before this court is concerned she never has sought to exercise the same.

G. C., 12042, and 12043, cited by counsel for plaintiff, make ample provision for the protection of a widow's rights in a partition case, where dower has not already been assigned to her in the whole of the tract sought to be partitioned.

Counsel for demurrant claims that the provisions of G. C., 12042, can not be forced upon a widow, but in the opinion of this court his suggestion is based upon the assumption that a dower interest is a life estate, and the facts as presented by the amended petition and demurrer do not warrant such assumption nor claim.

In the opinion of the court a dower interest, unassigned, is not a life estate, nor such an estate in lands as will prevent a partition by heirs.

For the foregoing reasons the demurrer to the amended petition is overruled with exceptions.

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FIXING RATES OF STREET CAR FARE.

Superior Court of Cincinnati.

JOHN C. ROGERS, A TAX-PAYER, ETC., PLAINTIFF, V. THE CITY OF
CINCINNATI ET AL, DEFENDANTS.

Decided, April 3, 1919.

*Municipal Corporations—Validity of Ordinance Fixing Street Car Fares
at the End of a Specified Period—Construction of the Words "at the
End of"—Equitable Rates Based on Cost of Carrying Passengers.*

1. Where an ordinance is regularly passed in pursuance of the Rogers Law and its provisions accepted by the traction company giving authority to a municipality "at the end of twenty years" and every fifteen years thereafter, to fix the rates of street car fare, etc., the city is within its power if it acts within a reasonable time subsequent to said twenty year period.
2. The authority, at the end of twenty years, to fix rates of street car fare, etc., given to a municipality under the law continues until an effectual ordinance is passed by council and accepted by the traction company.
3. Where authority is given to a municipality to fix the rate of street car fares, etc., if the rate is based upon a fixed rule which establishes a definite rate, the fares are not variable or uncertain.
4. Where a municipal franchise ordinance provides that a sufficient sum is to be produced by fares charged so that the city shall in any event get a specified sum of money, the deferring of the payment thereof is not a lending of the credit of the city.

Crosley & Rogers, for plaintiff.

Saul Zielonka, City Solicitor for the City of Cincinnati.

Ernst, Cassatt & Cottle, for The Cincinnati Traction Company.

Joseph Wilby, for The Cincinnati Street Railway Company.

GUSWEILER, J.

This cause is before the court upon an application of the plaintiff for a restraining order to enjoin the enforcement of Ordinance 253-1918 City of Cincinnati, by a challenge of the validity of said ordinance revising the fifty year franchise of The Cincinnati Street Railway Company. It is claimed that the City of

Cincinnati had no authority to pass such an ordinance and that in various respects said ordinance is invalid.

The question as to what might be a fair, reasonable rate of passenger car fare charge is not in issue. Our sole matter of concern involves the validity of the passage of Ordinance 253-1918 on August 23, 1918, as a compliance with the provisions of the Rogers law authorizing the fixing of rates of fare at the end of twenty years from the passage of the Act of April 22, 1896 (92 O. L., 277).

I.

As to the first question raised by the plaintiff we note that the Rogers law reads, as found in the Revised Statutes, Section 2505d:

“ * * the municipal corporation in which such street railroad is situated shall have the power at the end of twenty years from the passage of this act and every fifteen years thereafter, to fix the rates of fare, car license fees, percentage tax on gross earnings, transfers and all other terms and conditions on which said railroad is operated in said city.”*

Plaintiff contends that the first twenty year period provided for in the Rogers law having expired on April 22, 1916, the passage of said ordinance on August 23, 1918, was *too late* for the City to exercise its power to revise such rates, etc., *“at the end of twenty years from the passage of this act.”* This contention is based on the theory that *“at the end of”* means at the very moment of the expiration of that period. The defendants contend that the words *“at the end of”* as used in the Rogers law mean *“within a reasonable time after the expiration of”* such time.

The evidence discloses that in 1913 the city council sought a valuation of the property of The Cincinnati Street Railway Company for the purpose of assisting in the revision; that in pursuance thereof, the Public Utilities Commission of Ohio handed down a tentative valuation; that on April 18, 1916, the city council passed a resolution finding that it was necessary that the terms and conditions of the grant be revised and changed and fixed April 22, 1916, as the date for commencing public

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hearings thereon; that said hearings and proceedings were continued until the adoption of an ordinance of March 14, 1917, which was held invalid by the Supreme Court about March 5, 1918; that the city immediately resumed its proceedings and adopted the ordinance now in question, which was agreed to by the Street Railway Companies.

With the plaintiff we do not agree on this question. While the defendant's theory is logical and reasonable, nevertheless we do not feel that the city is bound to act at all during the fifteen years; that it is not bound during said period at any particular moment to act, whether reasonably near the end of twenty years or not. We believe that the proper construction to be placed on this disputed language is such as would give the city the right to act at any time during the fifteen year period or at least within a reasonable time subsequent to the twenty year period, which we find was done in the case at bar. *State ex rel Herman, v. The Oakwood Street Railway Company*, 11 C.C.(N.S.), 263; affirmed, 81 O. S., 502; *Davidson v. Mfg. Co.*, 99 Mich., 501; *La Dow v. Bement & Son*, 119 Mich., 685. However, after said decision and the exercise of such right, assuming that the Traction Company accepts the city's change, then no further change can lawfully be made during the remainder of the term of said fifteen years.

The Cincinnati Street Railway Company, having accepted the provisions of the original ordinance, effective beginning April 22, 1896, made in pursuance of said Rogers law, we must determine all the issues in this case based upon said ordinance and said Rogers law.

The Legislature of Ohio, in passing the Rogers law, considered fifty years as a reasonable period for the grant of the right to use the streets, etc., of a municipality, but when it came to the exercise of the power to regulate the rates of fare, etc., it realized that fifty years would be an unreasonable period to suspend such power of regulation, and therefore divided said fifty year period into three periods, namely: First, the period of twenty years and the two periods of fifteen years each. Council had the delegated power of regulating such rates until such time as the city and the company agreed upon a rate mutually satis-

factory. The acceptance of the fifty year franchise by the company resulted in the bargaining away by the City of Cincinnati of its power to regulate for the period of twenty years. At the end of such period the city was vested with two rights:

First. The delegated power to regulate which did not require the consent of the company. In fact, the rate continued to be established contrary to its wishes with the right of the company to file proceedings in court to collect said rate in accordance with the provisions of the Rogers law.

Second. The city could fix a rate satisfactory to the company, and the company accept the same, thereby constituting a contract and suspending the power of the municipality to regulate the rate during the period not exceeding fifteen years as provided by said Rogers law.

Our judgment is that at the expiration of the twenty year period, if the city and the company did not agree as to the rate fixed, said rate would be a regulatory rate and not a contract rate, and council having the power, could change said rate as often as public exigencies required. But as soon as a rate was fixed which was accepted by the company, a contract was thereby created, which can not be changed for the unexpired portion of said fifteen year period. That is, council and the company could agree at any time during said first fifteen year period, but could not exceed a period which would extend beyond the fifteen year period after the expiration of the twenty year period.

The power granted to the City of Cincinnati under the Rogers law to fix rates at the end of twenty years was continuing, we think, until an effectual ordinance was passed by council and accepted by the company resulting in a contract for the remainder of the fifteen year period. *In re Railroad Commission Cases*, 116 U. S., 307; *Providence Bank v. Billing*, 4 Peters, U. S., 514; *Pond on Public Utilities*, Section 499; *Omaha Water Company v. Omaha*, 147 Fed., 1; *Freeport Water Co. v. Freeport City*, 180 U. S., 587; *Detroit v. Detroit St. Ry. Co.*, 184 U. S., 368; *Home Telephone & Telegraph Co. v. City of Los Angeles*, 155 Fed., 554. The last sentence of Section 2505d reads:

“Should the parties *not agree* as to whether said terms are equitable, the same may be submitted to adjudication of a court

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of competent jurisdiction in a suit brought by the company to enjoin the municipal corporation from enforcing the terms so fixed.”

Our conclusion on this point is that the city had the power to enter into an agreement with the Street Railway Company for a period not exceeding the expiration of such fifteen year period. The effect of the acceptance of Ordinance 253-1918 by the company was to suspend for the remainder of the fifteen year period the city's power of regulating fares, etc.; but after the expiration of the first twenty year period, and before the making of such a contract, the city's power of regulating fares, etc., was continuous and could not be exhausted either by lapse of time or by an ineffectual attempt to enter into a contract.

II.

Plaintiff's second contention is that the provision in Section 2505d of said Rogers law to the effect that no increase of fare shall be allowed, applies during the entire fifty year period, while defendants contend that this restriction applies only to the twenty year period.

A careful reading of the Rogers law provisions can bring about no other conclusion than that plaintiff's contention is not well taken.

The quotation of some of the language of the statute involving this point answers the question itself:

“ * * the municipal corporation in which such street railroad is situated shall have the power at the end of twenty years from the passage of this act and every fifteen years thereafter to fix such rates of fare, car license fees, percentage tax on gross earnings, transfers and all other terms and conditions on which said railroad is operated in said city.”*

The only restrictions upon such right of revision at the end of such twenty year period, and subsequent fifteen year period are those set forth in the subsequent portion of said statute, to-wit:

“The terms there fixed shall be equitable according to the then cost of carrying passengers, etc.”

There is no provision that after the expiration of such twenty year period no increase of fare or decrease of car license fees or percentage tax on gross earnings shall be allowed, as is provided with reference to the time the franchises of the constituent company are originally extended to fifty years. On the contrary, the express injunction is that the terms of such revision *shall be equitable according to the then cost of carrying passengers*. It follows that this means that the fares originally charged may be either increased or reduced at the end of the twenty year period, if such increase or reduction "*be equitable according to the then cost of carrying passengers*." The Rogers Law does provide relative to the initial agreement that during the first twenty years "*that no increase of fares shall be allowed in any case, and that no decrease shall be allowed in any case of car license fee or percentage tax on gross earnings*." During the next two periods of fifteen years each, this limitation does not govern, but the municipality may *fix the rates of fare, car license fees, percentage tax on gross earnings and all other terms and conditions upon which said railroad is operated in such city*" * * * which terms there fixed shall be equitable according to the then cost of carrying passengers." The suggestion by plaintiff that it was the intention that the fares might be revised downward and not upward finds no support in the language of the statute or of the grant. We fail to see by any show of reason that the restriction on the rates of fare provided in the Rogers Law for the first twenty years shall run for the full term of fifty years.

III.

Plaintiff's third contention is that when the City on March 14, 1917, passed an ordinance attempting to revise the grant of August 13, 1896, which ordinance the Supreme Court decided as unconstitutional, that the City had exhausted its power to revise said ordinance during the present fifteen year period. Our conclusion on that point is as previously stated that the power of the City of Cincinnati under the Rogers Law to fix rates, etc., at the end of twenty years was continuing until an effectual ordinance was passed by Council and accepted by the Company, resulting in a contract for the remainder of the fifteen year period.

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IV.

Plaintiff's fourth contention is that the ordinance is defective in that it makes possible a reduction of the car license fees, etc., which is prohibited in the initial twenty year period part of the Rogers Law. Our conclusion, of course, will be the same as recited in our foregoing opinion on the second objection made by the plaintiff.

V.

The plaintiff's fifth contention is that the fares provided for in Ordinance No. 253-1918 are "uncertain" and "variable" and that the plan adopted in the ordinance of providing for service at cost is not a "fixing" of rates of fare. We are of the opinion that the authority granted in the Rogers Law, "to fix rates of fare etc.," at the expiration of twenty years does not require the city to designate a definite amount, and council may provide a fixed rule by which rates based on service at cost shall be determined. *Cricket et al v. State*, 18 O. S., 9; *Gest v. Construction Co.*, 224 Mo., 369; *Regina v. Local Government Board*, 87 Law Times Rep., N. S., 383; *Flagg v. Columbia Co.*, 51 Ore., 172. The City having provided a definite rule by which the rates of fare, etc., are to be determined, the ordinance in law is not uncertain or variable. The power given by the ordinance to the Director of Street Railways is not an unlawful delegation of its power by Council. *State, ex rel Campbell, v. The Cincinnati St. Ry. Co. et al*, 97 O. S., 283. *Fassy v. State ex rel*, 95 O. S., 232; *Alter v. Cincinnati*, 56 O. S., 67; *Akron v. Dobson*, 81 O. S., 66; *Tiedeman on Municipal Corporations*, Section 113; *Dillon on Municipal Corporations*, Section 96. He is not authorized to fix fares and license fees. He is merely authorized to act in behalf of the City in approving certain expenditures. Council was authorized to impose upon him the ministerial duty of inspecting and approving or disapproving the street railway budget. He has no authority under the ordinance to approve expenditures except of the classes provided by the ordinance itself.

VI.

The plaintiff's sixth contention is that the right of purchase at a certain amount reserved to the City in said ordinance, which item

is not contained in the original law, invalidated the present ordinance. The right of purchase reserved to the City not being binding on the City to purchase being a privilege merely which the City may or may not exercise, we fail to observe in what manner the validity of the ordinance can be brought into question.

VII.

The seventh contention is that said ordinance insofar as it postpones the payment of any obligation of the defendant companies to the said City, such as the deferring of the payment of the tax on gross earnings to the payment of other obligations of said companies, it is to that extent, the lending of the credit of the City to the said companies in violation of the Constitution of the State of Ohio. The ordinance provides that a sufficient sum is to be produced by the fares charged so that the City shall in any event get the specified sum of money. The Supreme Court held in 97 O. S., 83, that the City's Rapid Transit property earnings and income were pledged as security for the securities of the Traction Company, which in effect amounted to the lending of the City's credit to this extent which the Constitution prohibits. But the case at bar presents no such case at all similar. There is no property belonging to the City being pledged or used to involve the City's credit in any manner whatsoever. We fail to find any responsibility on the part of the City for any obligations incurred by the companies or any evidence tending to indicate a lending of credit in any manner by the City. We disagree with the plaintiff on this contention.

VIII.

Plaintiff's eighth contention is that The Cincinnati & Hamilton Traction Company was not included within the provision of the Rogers grant, but is included in the ordinance in question, and therefore the ordinance is invalid.

Since the making of the Rogers grant, The Cincinnati Street Railway Company and The Cincinnati Traction Company have made numerous line extensions, and these extensions are all covered by the ordinance under consideration. We are of the opinion that the authority of the City in revising the Rogers grant is

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broad enough to include the power to contract with The Cincinnati Traction Company and The Cincinnati Street Railway Company for what is in effect another extension. The evidence discloses that The Cincinnati & Hamilton Traction Company (the Millcreek Valley line) is under lease to The Ohio Traction Company, the owner of the entire capital stock of The Cincinnati Traction Company; that it extends for a distance of perhaps five miles through a populous portion of the City of Cincinnati and is an essential part of the City's street railway lines; that the Cincinnati & Hamilton Traction Company claims the right to charge fares of 10 cents or 8 1-3 cents by the sale of tickets; that the city, for the purpose of making the fares of that road uniform with other street railway routes and for the purpose of giving the City of Cincinnati the benefit of The Cincinnati & Hamilton Traction Company's service for the purpose of making all of that road a virtual extension of the Cincinnati system, required The Cincinnati Traction Company and The Cincinnati Street Railway Company as a condition to a revision, to agree to incorporate The Cincinnati & Hamilton Traction Company road within the purpose of the present ordinance. It appears from the evidence that approximately 85% of the receipts and expenditures of the Millcreek Valley line arises from business within the City of Cincinnati, and that of the remainder, at least one-half arises from travel to and within the villages of Lockland, Wyoming and Glendale, which are suburbs of Cincinnati, so that the City is not prejudiced in any way by this part of the ordinance. On the contrary, it is admittedly benefited thereby.

The question as to whether or not the street car fares charged under this last ordinance revision are fair, just and reasonable is not raised by the issues in this case, and is not before us for consideration. Our entire concern in the case at bar is the City's power to pass such an ordinance and whether said ordinance is valid.

Our finding is that the City of Cincinnati had the power and authority to pass said ordinance and that the terms thereof are valid in every particular. It follows that the injunctive relief prayed for herein will be denied and the petition will be dismissed at plaintiff's costs.

**CONSTRUCTION OF TESTAMENTARY PROVISIONS
APPARENTLY CONFLICTING.**

Common Pleas Court of Hamilton County.

GEORGE S. BROWN, TRUSTEE UNDER THE WILL OF SUSAN S.
BROWN, DECEASED, v. ALICE L. BROWN, ET AL.

Decided, October Term, 1919.

Wills—Determination as to Intention of Testatrix with Reference to Continuation of a Trust—Construction Based on Inconsistent Purposes to be Avoided—Time for Distribution Evidently Fixed by Testatrix as at her death—Subsequent Item of Will Held to Apply to Contingency which has not Arisen.

DIXON, J.

This is an action to construe the will of Susan S. Brown, deceased, and to obtain an order to sell and convert certain real estate belonging to the estate of the decedent.

The plaintiff, George S. Brown, was the husband of the decedent at the time of her death, and is the trustee under her will. The defendants are all those in being who are in any way directly or indirectly interested in or affected by the provisions of the will.

It appears from the evidence that Alice L. Brown, mentioned in the will, who is a daughter of the testatrix, married one Stanley A. Hooker, Jr., shortly before her mother's death and after the making of the will, and that two children have been born of said marriage. It further appears from the evidence that Agnes L. Brown, mentioned in the will, has died, unmarried, and that Ada Williams, another of the persons mentioned therein, has died, leaving as her sole surviving children and heirs at law, the defendants Leslie Williams and Jerome Williams. It is also in evidence that at the time of the execution of her will by Susan S. Brown and at the time of her death, her daughter, the defendant Alice L. Brown who is still living, was her only child and sole heir.

Item One of the will directs that all the debts of the testatrix be paid.

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Item Two gives to the husband of the testatrix, George S. Brown, the use of the family residence during his life, together with the household furniture belonging to the testatrix therein.

Item Three gives to the daughter of the testatrix, Alice L. Brown, all the wearing apparel of the testatrix together with her jewelry and silverware.

Item Four is a bequest of one hundred dollars to the Home for Incurables.

The remaining provisions of the will are as follows:

“Item Five. All the rest and residue of my estate, real, personal or mixed, I give, devise and bequeath to my beloved husband, George S. Brown, in trust to manage and invest said property, collect the rents, income and profits, and after payment of taxes, assessments, repairs and all other necessary expenses out of the rents, income and profits to pay any balance quarterly, one-half to my husband during his life for his separate use and support, but without power on his part of anticipation, alienation or subjection to his debts, said rents, income and profits, and one-half to my daughter, Alice L. Brown, for her separate use and support, but without power on her part of anticipation, alienation or subjection to her debts, said rents, income and profits.

“Item Six. In case I survive my husband, I give, devise and bequeath to my daughter, Alice L. Brown, all my estate, real, personal or mixed, except the sum of \$40,000, which is provided for by Item Seven of this will. If at my death my daughter be dead, with children or grandchildren living, said children or grandchildren of said deceased daughter to take said estate in such proportions as the law of Ohio would provide had said deceased daughter taken said estate under this item of this will and died intestate.

“Item Seven. In case I survive my husband, I will that the sum of \$20,000 shall be held in trust by the Union Savings Bank & Trust Company of Cincinnati, Ohio, and the sum of \$20,000 shall be held in trust in the Central Trust & Safe Deposit Company of Cincinnati, Ohio, to pay to my said daughter, Alice L. Brown, the income during her life for her separate use and support, but without power on her part of anticipation, alienation or subjection to her debts said income, and at her death the principal to be paid to her heirs and devisees.

“Item Eight. If my daughter die without children or grandchildren, then I will and devise that all my estate shall go, one-seventh to my sister, Agnes L. Brown, one-seventh to my sister, Catherine B. Harries, one-seventh to my brother-in-

law, Charles A. Brown, one-seventh to my sister, Agnes L. Brown in trust for my brother, James T. Brown, one-seventh to my niece, Carolyn B. Ireland, one-seventh to my niece, Marion L. Brown, and one-seventh to my niece Ada Williams. If any of the above be not living at the time of my death, their share shall go to their children, or if none living, to their grandchildren, or if none living, then to the others named in equal parts.”

The primary question involved in the construction of this will is the determination of the interest or estate which the daughter, Alice L. Brown, receives thereunder, and the solution of this problem involves a consideration of *Item Eight* for the purpose of determining whether this item is to be applied to *Item Five* so as to create a life estate only in Alice L. Brown with a contingent remainder in the persons named in *Item Eight*, or whether *Item Eight* applies solely to the contingencies provided for in *Item Six*.

It will be observed that with the exception of certain small bequests, the entire estate of the testatrix is given by *Item Five* of her will to her husband, George S. Brown, as trustee, to pay one-half of the net income thereof to himself during his life and the other half to the daughter, Alice L. Brown. It will also be noted that no provision is made for the continuation of the trust created by this item beyond the life of George S. Brown. No disposition is made of the proceeds of the trust after the death of George S. Brown, nor is there any provision made for the appointment of a trustee to succeed George S. Brown upon his death.

What then was the intention of the testatrix with reference to the continuation of the trust, the disposition of the trust funds and the vesting of the estate after the death of George S. Brown?

From all that appears in *Item Eight* of the will, the trust was created to continue only during the life of George S. Brown and to lapse upon his death. If there was nothing further in the will there would be no question but that Alice L. Brown, being the sole heir of the testatrix, would receive the entire trust estate upon the death of George S. Brown, and would now be possessed of a vested estate in remainder. Inasmuch as both the husband and the daughter of the testatrix survive her, is

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the vested estate in remainder which the daughter would possess under the above contingency, diminished or disturbed by any of the subsequent provisions of the will?

In *Linton v. Laycock et al*, 33 Ohio St., 128, the court on page 134, lays down the following rule for guidance in the construction of wills:

“The controlling principle in the construction of wills, is the ascertainment of the intention of the testator. But where the intention remains in doubt, resort must be had to settled rules of construction for aid in the solution of the difficulty.

“It is well settled that the law favors the vesting of estates, therefore: ‘In the construction of the devisees of real estate.’ It has long been an established rule for the guidance of the court, that all estates are to be holden to be vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the courts can not treat them as vested without deciding in direct opposition to the terms of the will.’ (Per Best, C. J., *Duffield v. Duffield*, 1 Dow. & Cl. 311.)”

In *Hamilton v. Rodgers*, 38 Ohio St., 242. the court speaking through Longworth, J., say on page 255:

“Although conceding that in the interpretation of wills, courts in general favor that construction under which estates will vest at the time of testator’s death, yet this, like every other rule of construction, will be controlled by the intention of the testator as gathered from the whole will. As was said by Scott, J., in *Richey v. Johnson*, 30 Ohio St., 288-292: ‘We are to read the whole will and ascertain not only what the testator has said, but what he has forborne to say; and the construction given to any part of the will should conform to its general scope and purpose as collected from the whole document.’ ”

If we are to assume that the testatrix intended that *Item Eight* of her will was to be applied to or read in conjunction with *Item Five*, and the words, “If my daughter die without children or grandchildren,” which appear in *Item Eight*, are to be construed as not referring to the lifetime of the testatrix but to any period thereafter, then there could be no absolute vesting of the estate in remainder until the death of the daughter, at which time it would pass to and vest in her children or grandchildren, if any survive her, otherwise, to the persons named in this item. In the interim between the death of

George S. Brown and the daughter, Alice L. Brown, the latter would be possessed of a life estate only. Or, to state the situation perhaps more accurately, Alice L. Brown would be the sole beneficiary for life of a trust which the testatrix did not create, and which would be administered by a trustee, in whose selection the testatrix could have no voice. To place such a construction upon this will would, it seems, impute to the testatrix an intention wholly inconsistent with that which is clearly manifest by other provisions of the will, and at the same time, indicate a state of mind on the part of the testatrix toward her daughter for the existence of which neither the evidence adduced at the trial nor the will itself when considered as a whole, furnishes the slightest pretext.

Let us consider Items Six and Seven. These items it will be observed, are contingent upon the testatrix surviving her husband, and inasmuch as both George S. Brown and Alice L. Brown survived the testatrix these contingencies did not become effective. However, for the purpose of ascertaining the general intention of the testatrix, let us assume that the testatrix did survive her husband. In this event, Alice L. Brown would acquire the entire estate disposed of in Item Five; with the exception of \$40,000, which sum is left in trust with designated trust companies. These companies as trustees, are required to pay the net income of said trust to Alice L. Brown during life, "and at her death the principal is to be paid to her heirs and devisees." The use of the term "devisees" implies the right upon the part of Alice L. Brown to dispose of the corpus of this trust fund by will, and in event of her failure to make a will, the corpus of the trust fund would pass to her heirs; that is her children. In this contingency it will be observed, a portion of the estate would go to Alice L. Brown absolutely; the balance of the estate would be held in trust for her for life, and upon her death she would have the right to dispose of the entire trust estate by will, and upon her failure to do so it would pass to her heirs.

If Alice L. Brown did not survive the testatrix, but left surviving children or grandchildren, the entire estate of the testatrix under the provisions of Item Six would pass to such children or grandchildren "in such proportions as the law of Ohio

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would provide had said deceased daughter taken said estate under this item of this will and died intestate." In other words, the situation would then have been the same as under the former contingency, provided the daughter had survived the testatrix and had subsequently died leaving no will.

But, if Alice L. Brown did not survive the testatrix and left no surviving children or grandchildren, what then? No provision was made by the testatrix in Item Six for this contingency. What then were her intentions in this event? Is not the logical and intended answer to this query found in the provisions of Item 8? While it is true that in Item 6, the testatrix uses words that are wholly free from ambiguity when she says: "If at my death my daughter be dead with children and grandchildren living," and would naturally be expected to use the same clear language in Item 8, instead of the words, "If my daughter die without children or grandchildren," if she meant in the latter item the death of her daughter prior to her own death, nevertheless, the mere failure on the part of the testatrix to use the same language to express the same intention in different items of her will should not be used as a pretext for placing upon the will a construction which apparently does violence to the intention of the testatrix as gathered from the evidence adduced at the trial and a careful analysis of the instrument as a whole.

Bearing in mind that under the provisions of Items 6 and 7, Alice L. Brown, in the event that the testatrix had survived her husband, would have received the entire estate of her mother outright with the exception of the sum of \$40,000, from which she would receive the income for life with the right to dispose of the fund itself by will, can it be said that the testatrix intended that her daughter should have only an uncertain, indefinite and contingent interest in her estate if the husband, George S. Brown, outlived his wife, the testatrix? Nothing in the evidence, nor in the will itself, indicates any intention or desire on the part of the testatrix to thus punish or penalize her daughter merely because the testatrix preceded her husband into the valley of eternal sleep. Such a construction of this will would not only deprive the daughter of what the mother clearly in-

tended to give her, but at the same time, would prevent the absolute vesting of any part of the estate, some of which is real estate, until after the death of the daughter. On the other hand, there are most excellent reasons for holding that it was the intention of the testatrix to create a life estate only during the life of her husband, the plaintiff, George S. Brown, and thereafter to give her entire estate to her daughter. Under the management of her husband as trustee, in whom she apparently had the utmost confidence both as to integrity and business ability, she no doubt believed, as she might well do, that her estate would be well managed and preserved during the life of her husband and that upon his death, her daughter in the meantime having advanced in years and experience, would be well qualified and properly equipped to receive the entire estate upon the death of her father free from all trust restrictions.

As further evidence that the testatrix when she used the words in Item 8 of her will, "If my daughter die without children or grandchildren," was referring to the death of the daughter prior to her own death, it will be observed that in the last sentence of Item 8 the following language appears: "If any of the above be not living *at the time of my death*," etc. These words when given their ordinary and natural meaning, clearly indicate that the time for distribution among the persons mentioned in this item was fixed by the testatrix at her death, but that if Alice L. Brown, the daughter, were living at the death of the testatrix, the provision made for the persons named in this item would not take effect.

For these reasons the conclusion is inevitable that the testatrix intended the provisions of Item 8 of her will to apply to and expand Item 6 in the event of the death of the daughter prior to the testatrix, without surviving children or grandchildren, and that therefore, Alice L. Brown, having survived her mother, the testatrix, took upon the death of the testatrix an absolutely vested estate subject to the trust created by Item 5 for the life of George S. Brown.

An order may also be taken for the sale of the real estate described in the petition, for the reasons and purposes therein set forth.

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**WHEN AN EMPLOYEE ON AN INTERSTATE RAILWAY IS
ENGAGED IN INTERSTATE COMMERCE.**

Common Pleas Court of Darke County.

**WILLIAM B. RANDALL, ETC., ADMINISTRATOR, PLAINTIFF, V. THE
CINCINNATI NORTHERN RAILROAD COMPANY, DEFENDANT.**

Decided, March 25, 1919.

When Common Carrier and Employee are Engaged in Interstate Commerce—Employee on Train Operating on Only a Portion of the Carrier's Lines—Located Within a Single State and Carrying No Interstate Commerce is Engaged in Intrastate Commerce.

1. The character of the employment of a person in the service of a common carrier which is engaged in interstate commerce generally, is determined by the nature of his engagement at the precise time of injury.
2. A locomotive fireman who is in the employ of an interstate carrier, but who at the time he sustains an injury is a member of a crew operating a train scheduled between points within a single state only and over a portion of the carriers lines lying wholly within the same state, and which train carrier no passengers, mail, express, baggage, freight or other matter, destined for a point or points outside said state, or coming from a point or points without said state, is engaged in intrastate commerce, and the liability of such carrier and the rights of such employee are fixed and determined by the law of the state in which such injury occurred.

Martin B. Trainor for plaintiff.

Bickel, Baker & Murphy for defendant.

MANNIX, J.

Plaintiff in his amended petition avers that he is the administrator of the estate of Harry W. Randall, deceased, who died as the result of a railway accident on defendant's railway, and which accident occurred on the first day of August, 1914, while the decedent was in the discharge of his duty as a fireman.

The amended petition avers that the corporate capacity of the defendant as a corporation organized under the laws of the state of Ohio, and that it owns and operates a railroad running from

*Affirmed by the Court of Appeals, May 19, 1919.

the city of Jackson, in the state of Michigan, to the city of Cincinnati, in the state of Ohio, and that the defendant company was engaged in interstate commerce between said cities.

After averments of general negligence, certain special acts of negligence are alleged in the amended petition, including recklessness on the part of the engineer, improper rail construction, rotten ties, improper ballasting, etc.

The defendant files an answer made up of three defenses. The first is practically a general denial; the second has to do with the assumption of risk, and the third defense sets out a state of facts seeking to bring the case within the employers' liability and workmens' compensation law of the state of Michigan.

To this answer, the plaintiff files a reply in which he embraces, among other things, a first and second ground of reply to the third defense, and it is the second ground of reply to the third defense which is the storm center of this contention, because the case comes now before the court upon a demurrer to the second ground of reply to the third defense of plaintiff's answer.

This third defense is rather long and embraces many propositions too extensive to set out herein. This defense has been tested on demurrer, as I understand it, and the demurrer overruled. The effect of this finding would be, that the facts stated in this third defense, if true, would be sufficient to bring the case within the application of the workmens' compensation act and employers' liability law of the state of Michigan.

The third defense of the answer, in addition to setting out the terms of the Michigan act, alleges that the defendant had filed a certain statement with the Industrial Accident Board, and accepted the provisions of said act, and that the decedent at no time ever notified the defendant company that he elected not to be subject to said act, and that the said decedent and the defendant were both subject to said Michigan act; and further—

“Defendant alleges that on the 1st day of August, 1914, and for a long time prior thereto, it ran a passenger train, known as train number 21 from Jackson to Hudson in the state of Michigan, and back from Hudson to Jackson, daily. That said train number 21 was the same train that was drawn by the engine upon which the said Harry W. Randall was fireman at the time of said accident. That the return train from Hudson to Jack-

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son was known as train number 22. That defendant while so operating said train number 21 at said time from Jackson to Hudson was not doing any interstate commerce business, but was engaged in intrastate commerce only."

The second ground of reply, after alleging that the defendant was operating its railroad trains between Jackson, Michigan and Cincinnati, Ohio, admits—

"That while it is true the engine upon which Harry W. Randall was firing on August 1st, 1914, was drawing the passenger train from Jackson, Michigan, to Hudson, Michigan, on the aforesaid railroad highway, yet said engine and passenger train were a part of the general railway system of defendant from Jackson, Michigan, to Cincinnati, Ohio, and from Cincinnati, Ohio, to Jackson, Michigan, and said engine and passenger cars were instrumentalities engaged in interstate commerce over said railroad highway."

And then avers and sets forth facts showing the schedule of trains running between Jackson, Michigan, and Van Wert, Ohio, and other points, and finally avers, that the train upon which the decedent was injured left Jackson, Michigan, at eleven o'clock a. m. of said day bound for Hudson, Michigan, and that the said Harry W. Randall was injured between Jackson, Michigan, and Hudson, Michigan,; and finally avers that said train from Jackson, Michigan, to Hudson, Michigan was made up from the regular trains, including engine and cars that had been used in running from Jackson, Michigan to Van Wert, Ohio, and that said run from Jackson, Michigan, to Hudson, Michigan, and from Hudson, Michigan to Jackson, Michigan, enabled passengers to take another train on defendant's railroad to make transfers to points beyond the state of Michigan, and alleges that the decedent oiled, inspected, and fired the engine in order to keep it in readiness to commence its trip from Jackson, Michigan at 3.30 p. m. of said day to Van Wert and Cincinnati, Ohio, over the same general railway system, and that said engine so inspected, oiled, etc. was used each day as above stated for this purpose, and that it was the negligence of the defendant that caused the engine to leave the track causing said wreck, and that the said wreck interrupted interstate traffic.

While the plaintiff in his first ground of reply to the second defense denies that the decedent was engaged in intrastate com-

merce only, yet in the second ground of reply to the third defense he does not deny the allegation of the third defense, to-wit:

“That defendant, while so operating said train number 21 at said time from Jackson to Hudson was not doing any interstate commerce business, but was engaged in intrastate commerce only.”

And so, the real question is, whether the facts pleaded by the plaintiff in the second ground of reply to defendant's third defense are sufficient to bring the action on the face of the pleadings within the scope of the federal employers' liability act, and thus take it out of the application of the employers' liability law of the state of Michigan.

Counsel for the defendant railway company claim, that its demurrer should be sustained on two propositions:

1. The defendant complains, that the plaintiff is seeking to make out his case in his reply, when the entire case should have been stated in the petition, and that he can not invoke the interposition of the federal act unless he states facts in his petition, or amended petition, that would justify the introduction of evidence along that line.

2. The defendant claims that plaintiff has wholly failed by the allegations in the second ground of reply, to bring the case within the provisions of the federal statute.

Eminent counsel for plaintiff and defendant presented many authorities upon the first proposition and argued the same with vehemence and exceptional brilliancy.

If the court should resolve the second proposition in favor of the defendant, it will be unnecessary to pass upon the first proposition, and hence the court will take up the second ground first.

Section 8657 of the federal act provides that a common carrier, while engaged in commerce between the several states and territories, District of Columbia, or foreign nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce:

In other words, the carrier must be engaged in interstate commerce, and the person injured must be engaged in interstate commerce. *Pedersen v. Delaware, etc. R. R. Co.*, 229 U. S., 146; *North Carolina R. R. Co. v. Zachary*, 22 U. S., 248.

The pleader for the plaintiff cites a great number of interest-

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ing authorities, and presents forcible argument supporting the same, claiming that the precise work in which the decedent was engaged, and that the engine and passenger cars were instrumentalities engaged in interstate commerce, and if not that precisely, that the work that the decedent was engaged in was a work so closely related to interstate commerce as to be practically a part thereof, and among other authorities cites the case of *Roush v. B. & O. R. R. Co.*, 243 Fed., 712.

The opinion in this case was delivered by Judge Westenhaver of the United States District Court of North Dakota, and in which case the learned Judge comments upon the Pedersen case, reported in the 229 U. S., at p. 146.

In the Roush case, the defendant was engaged in operating a pumping station furnishing water indiscriminately and contemporaneously to locomotives engaged in both interstate and intrastate commerce, and the court held that the true test is, whether at the time of the accident the injured person was engaged in interstate transportation, or in work so closely related thereto as to be practically a part thereof. And in this same case, the learned Judge holds:

“That the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it.”

And holds that a track or bridge may be both used in interstate and intrastate commerce, and when so used it is an instrumentality of the former.

The learned Judge quotes at length from the opinion in the case of *Minneapolis etc. Ry. v. Winters*, 242 U. S., 353, in which Mr. Justice Holmes lays down the rule:

“This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine, upon a road permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on the employment at the time, not upon remote probabilities or upon accidental later events.”

The court believes that there is a distinction in the class of cases which come under the head of "instrumentalities of interstate commerce" and also "in work so closely related thereto as to be a part of the same." These cases are practically all confined to the repair of roadbeds, pumping stations, bridge carpenters, etc., whose work and instrumentalities are applied to both interstate and intrastate business.

Counsel for the plaintiff places great stress upon the *Pedersen v. Delaware R. R. Co.*, 229 U. S., 146. In this case the defendant was operating a railroad for the transportation of both freight and passengers in interstate and intrastate commerce, and the injured person was an iron worker employed in the alteration and repair of some of its bridges and tracks near Hoboken, N. J., and was injured while carrying a sack of bolts to said bridge. He was injured by an intrastate passenger train.

The opinion in the Pedersen case was delivered by Mr. Justice Van Devanter, and lays down the proposition, that a track or a bridge may be used in both interstate and intrastate commerce, and when it is so used, it is an instrumentality of the former, and that its double use does not prevent those repairing it from being engaged in an employment in interstate commerce.

It is clear in the mind of the court, that this rule is not inconsistent with the Winters case, *supra*, and not inconsistent with the case of the *Illinois Central Ry. Co. v. Behrens*, 233 U. S., 473, because Mr. Justice Van Devanter also wrote the opinion in the Behrens case, which was decided after the Pedersen case. The court in the Pedersen case says, that the real test is this:

"Is the work in question a part of the interstate commerce in which the carrier is engaged?"

It seems to this court, that this contention is settled by the Behrens case and by the case of *Erie R. R. Co., v. Welsh*, 89 O. S., p. 81. In the latter case Mr. Justice Donahue proceeds from the theory that a presumption exists in favor of the proposition that the law of the forum should control, and this proposition can only be destroyed by pleading a state of facts which brings the case clearly within the federal act, and shows to the court that at the time the accident actually happened the injured person was engaged in interstate commerce. The learned judge uses this language:

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“The important inquiry is as to what he was doing at the time the accident occurred. * * * That service had been fully completed and ended, and he had not re-engaged in any similar employment, so there is no evidence in this record tending to prove that at the time the accident actually happened this plaintiff was then and there engaged in interstate commerce, and the mere fact that shortly before that time he had been so engaged, or that the next service his master would require would be of interstate character, can not and does not establish the fact that at the time of the injury he was so engaged.”

After a careful examination of the authorities, the court is of the opinion that the Behrens case is controlling. The finding of facts in the Behrens case shows, that the intestate was in the service of the railway company as a member of a crew attached to a switch engine operated exclusively within the city of New Orleans; that he was a fireman and came to his death through a collision. That the general work of the crew consisted in moving cars from one point to another within the city upon the company's tracks and other connecting tracks; sometimes the freight was destined from within the city to without the city, or *vice versa*, and sometimes both classes. When the cars were empty, the purpose was to take them where they were to be loaded. In other words, the crew handled both interstate and intrastate traffic indiscriminately, sometimes moving both at once, but at the time of the collision the crew was moving cars loaded with intrastate freight exclusively, but upon completing that movement was to have gathered up and taken to other points several other cars as the step or link in their transportation to various destinations within and without the state. And Justice Van Devanter, following the Winfield case, held that injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was interstate commerce, but concludes with this finding:

“Here, at the time of the fatal injury, the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce, is immaterial under the statute,

for by its terms the true test is the nature of the work being done at the time of the injury.”

The court then held that plaintiff's decedent was not engaged in interstate commerce at the time of his death.

In the case at bar, there is no doubt but what on the day of his death the decedent was engaged in both interstate and intrastate commerce. The Van Wert to Jackson trip was an interstate trip, and if he had been injured upon that trip, there is no question but what the federal act would have controlled. However, as soon as he reached Jackson, the interstate trip ended. Another trip began then from Jackson to Hudson, which was wholly intrastate.

The second ground of reply does not set forth facts sufficient to show that the crew and the train were engaged in interstate commerce.

The Behrens case does not conflict with the Winfield case, because in the Winfield case the injury occurred at the end of the day's work while the decedent was leaving the yards and was necessarily an incident of the day's work generally, and the court held that the federal act applied because it was an incident of the day's work generally, and was interstate only because of that reason, and because the day's work included both interstate and intrastate traffic. This accident in leaving the yards in the Winfield case could not be distinguished from the day's employment. His going and coming was necessary to his general work, which included both intrastate and interstate commerce.

From the facts disclosed in the pleadings, it appears that the decedent was employed in purely intrastate commerce at the time of his death, and that his work was impressed with the character of intrastate commerce, and the law of the state of Michigan must control.

The case at bar, like the Behrens case, is distinguishable from the Winfield case, and cases of like character.

When decedent, at the time of the accident, is engaged in intrastate commerce, his remedy is governed exclusively by the law of the forum, and it can not be said that trainmen, firemen, and such employees are employed in interstate commerce when they are assisting exclusively in the movement of intrastate traffic.

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“For instance, when they are employed on a train containing only traffic billed between two points in one state, the line between the two points being wholly within the state, they are engaged in intrastate commerce.” Robert’s Injuries to Interstate Employees, p. 70, section 29.

The court does not think that sufficient facts are pleaded to bring the case within the provisions of the federal act. The court also holds that this must be done by the plaintiff, because under the decision of Justice Donahue, the presumption is that the law of the forum will control.

Having come to this conclusion, it is not necessary to pass upon the first proposition involving the question that the plaintiff is not permitted to make out his case in his reply.

This case was presented on both sides in a highly efficient and interesting manner, and eminent counsel have certainly aided the court in every way, and for that service the court expresses its thanks.

The demurrer to the second ground of reply to the third defense is sustained. The plaintiff may have his exceptions.

NO LIEN FOR PROCURING AN AWARD FROM THE INDUSTRIAL BOARD.

Common Pleas Court of Franklin County.

B.— v. EMMETT ET AL.

Decided, December 24, 1918.

Attorney's Lien for Service Rendered—Not Lost by Reduction to Judgment—But No Such Lien Can Arise Against an Award by the Industrial Commission.

While the lien of an attorney upon a fund produced by his efforts is not extinguished by its merger into a judgment, the claim is rendered nugatory by the bar of the statute where the fund consists of an award made by the Industrial Commission, and an action for the appointment of a receiver of a fund so awarded, or of so much of it as may be necessary to satisfy a judgment based on such a claim, must be dismissed.

L. W. Jones, for plaintiff.

F. F. Smith, contra.

KINKEAD, J.

The submission is upon motion by defendant to dissolve a restraining order, and an application by plaintiff for the appointment of a receiver for funds now in the hands of W. and the Aetna Life Insurance Company.

The petition by plaintiff alleges that he recovered a judgment in the municipal court against Emmett; that Emmett had a claim for compensation by the Industrial commission in the sum of \$860, to be paid by the Aetna Life Insurance Company.

Plaintiff's claim is for attorney's fees in prosecution of such claim, the balance due (after payments) being \$169.83.

Emmett executed a power of attorney and assignment of the sum granted him by the Industrial Commission to W., empowering the latter to draw the installments as they become due. It is claimed that such assignment operates as a fraud upon plaintiff.

The relief sought by the prayer of the petition is:

1st. A temporary restraining order against W. and the Aetna Insurance Company from making payments to W.

2d. For the appointment of a receiver to collect the money from W., as well as from the Aetna Life Insurance Company, or so much of the award to Emmett as will be sufficient to pay plaintiff's judgment.

Unless a party has some interest or lien upon a particular fund he can not apply for a receiver of it and a marshalling of claims thereto. *Drago v. Prosser*, 17 C.C.(N.S.), 39.

Allegation is made in plaintiff's petition that the sum of \$169.83 claimed by him as the balance due on the judgment represents the balance due him under his contract in representing him in the prosecution of the claim before the Industrial Commission.

This branch of the court held in *Huling v. Columbus*, 13 N.P. (N.S.), 408, that an attorney acquires an equitable lien on the proceeds of a judgment recovered through his efforts in favor of his client. Affirmed by Court of Appeals in *Walcutt v. Huling*, 27 O. C. A., 232; 5 Oh. App. Ct., 326.

However, notwithstanding this rule there are two other questions that arise under the conditions here presented:

1. Does the lien of the attorney cease to operate upon the

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fund produced by his service when merged in a judgment therefor?

2. Does the lien of an attorney attach to such a fund as that involved in this case?

The sum of \$215.11, now in the hands of defendant W., represents part of the fund ordered by the Industrial Commission to be paid by the employer of Emmett who had not come in under the compensation law, but who nevertheless was required to be paid by such employer, but which is being in fact paid by an Insurance Company.

It is claimed that the fund can not be reached for the reason that by Section 1465-88 of the Industrial act it is provided that:

“Compensation before payments shall be exempt from all claims of creditors and from any attachment or execution, and shall be paid only to such employees or their dependents.”

The final conclusions reached are that the lien of an attorney upon a fund produced by his services would not become extinguished by its merger in a judgment in a municipal court, and might follow and become affixed to the fund where it had been placed in trust in the hands of a third person.

In such case the claim of attorney's lien under the doctrine of *Drago v. Prosser*, *supra*, would in general form the basis for such action as the present one in which the lien might be enforced, and a receiver appointed as prayed for by plaintiff.

But the fact that differentiates this case from general doctrines concerning this subject is the provision of the compensation act that the *compensation before payment is exempt from all claims* or creditors and from any attachment or execution, and shall be paid only to such employees or their dependents. Section 1465-88.

By positive provision of statute, therefore, the fund arising from an allowance by the Industrial Commission under the workmen's compensation law is specifically made exempt from the common law lien of an attorney upon a fund produced by his services.

It therefore follows that plaintiff has no lien upon the fund in defendant W.'s hands. The result of the foregoing clear legal conceptions must be that as plaintiff had no claim of attorney's lien upon the fund, his action must fail. This must

be so because plaintiff could only have claimed that his petition had stated a legal cause of action entitling him to relief upon the theory that he had a common law lien, and had brought himself within the rule of *Drago v. Prosser, supra*, whereby he might pursue the fund produced by his services and thereby equitably impress upon it his equitable lien, in which case his cause of action would be one in equitable enforcement of his lien.

The conclusion therefore is that plaintiff has failed to state a cause of action, that the restraining order heretofore allowed should be dissolved, and the prayer of his petition be denied.

**PROVISION MAKING INSURANCE POLICY VOID UPON ENTERING
THE MILITARY SERVICE.**

Common Pleas Court of Licking County.

EMMA LAURA FRUSH V. OHIO STATE LIFE INSURANCE CO.

Decided, January 13, 1920.

Life Insurance—Clause Making Policy Void if Insured Enters the Military Service—Against Public Policy, When—Policy Not Rendered Inoperative by Death of Insured Soldier from "Flu."

1. The provision in a policy of insurance, so far as it makes such policy void upon entering military or naval service, would tend to hinder and deter volunteer service and would be against public policy.
2. Such provision can only be made a defense against an action on the policy when it is made to appear that the engagement in military service was the occasion or cause of the death of the insured.
3. If the death of the insured was caused by something which might have occurred in the same way if he had not been in military service, as in this case by the Spanish flu, then the service in which he was engaged was not the occasion of his death.

Fitzgibbon, Montgomery & Black, for plaintiff.

U. S. Brant, for defendant.

KYLE, J.

The plaintiff brings this action upon a policy of insurance issued by the defendant company on the life of Walter Guy Frush.

The case is submitted upon the petition and the answer and the agreed statement of facts. There is no dispute as to the is-

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suance of the policy; that all the terms were complied with by the insured; that due notice and proof of death of the insured was made to the company with demand for \$1,000 by the plaintiff as the beneficiary under the policy.

The issue presented by the pleadings and agreed statement of facts is as to the effect of the following provision in the policy:

“This policy shall be null and void, except for the amount of premium paid, if the insured shall die within one year by self destruction, whether sane or insane; or if the insured shall at any time engage in military or naval service in time of war (the militia not in actual service excepted) unless a special written permit therefor has been obtained from the company.”

The policy was issued on the 16th day of June, 1916. On the 20th day of July, 1918, Walter Guy Frush was drafted into the military service of the United States, the United States being then engaged in war with the governments of Germany and Austria Hungary. While the agreed statement of facts states that we were at war with Bulgaria and Turkey, we were not and have not been at war with Turkey, and I think also not with Bulgaria. On the 20th day of July, 1918, he was enrolled as a soldier, and up until the 9th day of October, 1918, the date of his death. He was located at Camp Sherman and while there contracted the disease known as the Spanish Flu, from the effects of which he died on said 9th day of October, 1918.

The defendant claims that under the provision of the policy above given the death of the insured during military service, as above stated, voided the policy, and that the plaintiff is only entitled to recover the amount of premiums paid on the policy amounting to \$116.92, which the defendant company stands ready to pay.

The plaintiff claims that the insured was not *engaged* in military service within the meaning of the exception above given provided in the policy, and it is also contended that the insured was not engaged in combat service, and did not die as the result of such military service, and that nothing that he did in the military service hastened or occasioned his death.

The questions presented for consideration are:

Is the provision of the policy, in so far as it prohibits the insured from engaging in military service, against public policy?
And

Would that provision in policies of insurance tend to discourage entering military service, and be an attempt on the part of the company to grant or withhold permission, and be an exercise of a power and influence which would be against public good?

Public policy has been defined in the case of the *Northwestern Life Insurance Company v. Coshocton Glass Company*, 13 Nisi Prius, New Series, page 239, as follows:

“Public policy is that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good.”

The questions of public policy are dealt with in the case of *Hard et al v. Harris et al*, 1 C.C.(N.S.), page 113. In the opinion the court say:

“It is a well established principle of law in this country that no one can lawfully do that which has a tendency to be injurious to the public or against the public good. If a contract binds the maker to do something that is opposed to the public policy of the state or nation, it is void, however solemnly made. In applying this rule to particular cases, however, much difficulty is met with. Public policy is in its nature uncertain and fluctuating (23 Am. & Eng. Enc. of Law, 2nd Ed., 455.); its limits can not be determined by the courts with any exactness. The Legislature can and does define the public policy of the state. Any contract in contravention of a statute would be against public policy; so, too, many things not forbidden by express legislative enactment are against public policy, and the courts have repeatedly set aside contracts which they have determined to be against good government and the spirit of our institutions. Public opinion is usually prescribed by the people before it is enacted into the statute law.

“If the contract alleged in the petition tended to create the results claimed by counsel for the plaintiffs in error as necessarily flowing from it, it would be against public policy, and should not be enforced whether such results really did follow or not. Such results, it is admitted, were not contemplated by the parties when they entered into the contract. If the public service is affected by his contract, it is incidentally. The petition does not disclose that any of the parties, plaintiffs or defendants, were in the military service at the time the contract was entered into. The contract was not in contravention of any statute. That public injury would result from this contract can not be a matter of opinion; it must be free from doubt.”

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I have no doubt that voluntary enlistment in the army would be, more or less, affected in the minds of some if they were insured and knew that entering military service would forfeit their insurance.

That the insured in this case was drafted would not affect the fact that such provision in the policy would deter voluntary enlistments, and if that were the effect it would be against public policy, and, as stated in the above cited case, if it tended to create that result as necessarily flowing from it, it would be against public policy.

In the case of *Welts v. Insurance Company*, 48 New York, p. 34, the first syllabus is as follows:

“A provision in a policy of life insurance forfeiting the policy in case the assured shall enter into any military or naval service without the consent of the company, includes only such service as will require the person entering it to do duty as a combatant. An employment therefore, by military authorities, in constructing a railroad bridge, is not within the prohibitions of the policy, and does not invalidate it.

“*Held*, that the language of the proviso included only death from casualties or consequences of war or rebellion carried on or waged by authority of some *de facto* government; that this case did not come within that limit, and that defendant was liable.”

In that case the question turned upon the fact that the insured was employed by the military authorities to construct a railroad bridge, and such employment by the military did not invalidate the policy.

If you carry out the language and principles that seem to be included in that case it would be necessary for the insured to come to his death from casualties or consequences of the war. And there is no doubt in mind that the insurance company could protect itself against a liability from the death of an insured which was occasioned by the casualties or consequences of war.

The provision of the policy is “if the insured was at any time engaged in military or naval service in time of war” the policy should be void.

In order to come within the meaning of that clause it seems to me that such engagement in military service should be the cause or occasion of the death of the insured in order for the company to escape liability. If the death of the insured was

caused by something outside of his military service, and which might have occurred in the same way if he had not been in military service, then the service he was engaged in was not the occasion of his death.

Engagement in military service means to expose to dangers which were not incident to civil life. But, as is well known, the danger in civil life was just as great as in military service in respect to the disease called the "flu."

The insured in this case did not come to his death by reason of his induction into military service. Under the terms of the policy to engage in military service means to be exposed to dangers and perils of life not incident to civil life, and if the death of the insured was not occasioned or caused by such military service the company would be liable for the full amount of the policy.

Therefore, it is my opinion that the provision in the policy, so far as it makes such policy void upon entering into military or naval service, would tend to hinder and deter volunteer service and would be against public policy. It may be noted as a fact that it would have been impossible to have raised a volunteer army to have met the needs of the late war, and how far the elements of insurance policies might have deterred men from volunteering would be hard to tell.

The policy of insurance was not based upon the exposure of the insured in military service, and the company would have the right to defend if the engagement in military service was the occasion or cause of the death of the insured. It would, in that case, be a complete defense to an action on the policy, except as to the repayment of premiums already paid. In this case the drafting into the military service and the entering of such service, as shown by the agreed statement of facts, was not the occasion or cause of the death of the insured. Therefore, the company is liable to the plaintiff for the full amount of the face of the policy, and a judgment may be entered accordingly.

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NUISANCE CREATED BY A SMOKING ROUNDHOUSE.

Common Pleas Court of Franklin County.

THEODORE OLPP V. THE HOCKING VALLEY RAILWAY CO. ET AL.

Decided, January Term, 1920.

Nuisance—Illumination of the Subject Needed in Ohio—Earlier and Modern Practice with Reference to—Permanent or Continuing Nuisances—Petition for an Injunction Must Disclose Inadequacy of Legal Remedy—When Concurrent Jurisdiction is Conferred—Laches and the Balancing of Injury—Application of Principles to the Case in Hand.

1. Equal and correlative rights are possessed by all doing business or residing in the same vicinity, except that each is responsible for injury which he may cause to another. When one builds a structure and uses and maintains it in such way as to make it a nuisance to others, the law imposes the imperative duty upon the one responsible to remove the cause of injury without unreasonable delay, if it be within his power by the exercise of skill and labor so to do.
2. The appropriate remedy being dependent upon the nature and kind of nuisance,—whether continuing or permanent,—in the common law sense, it is essential that plaintiff's petition shall allege sufficient facts to disclose the particular kind complained of. A court must be advised whether a nuisance is temporary or permanent as a prerequisite to the determination of the adequacy of the remedy at law. When upon objection made at the opening of trial it is made to appear from the petition and by statements of counsel that the cause is not founded upon a definite theory, the court may thereupon conclude as upon demurrer that the petition is insufficient for want of facts to show definite theory and because of failure to disclose whether the nuisance complained of is *continuing* or *permanent*.
3. Not only is it essential that a plaintiff seeking equitable relief shall state sufficient facts in the petition to show a definite theory concerning the kind of nuisance complained of, but it is also essential that the petition shall state sufficient facts to show the inadequacy of the remedy at law.
4. As resort may be had to equity only in cases of continuing nuisance to avoid a multiplicity of actions, or in any case of nuisance where

the remedy at law is shown to be inadequate, it is essential that the petition shall fully state the ultimate facts relied upon to adequately disclose the nature and theory of the cause of action.

5. The legal test of distinction between a continuing and permanent nuisance is whether the cause therefor may be removed and the same can be thereby abated by skill and labor by the one whose duty it is to do so. If it can not be so abated, and it will probably continue indefinitely unless changed by the hand of man, it is to be regarded as permanent. If the cause can be removed and the nuisance thereby be abated, the nuisance is continuing.
6. If the nuisance be permanent, the plaintiff is entitled to recover at once and in one action all the damage, both present and future, which he may sustain. The measure of damage for injury to land by permanent nuisance is loss of market value before and after the injury; for continuing nuisance injuring land the measure of damage is loss of rental value before and after injury.
7. A test of the inadequacy of legal remedy is whether there is a definite, settled rule of assessment or allowance of pecuniary award which is the rule when the nuisance affects only the personal right of comfort, convenience or health.
8. When the nuisance affects both personal and property right, the law fixes a certain definite standard or measure of damage for the property right; but for injury to personal right there is no definite standard of pecuniary award; *quaere*: whether, if only the right of comfort is injured, but the inconvenience is shown to be of such character and extent as in fact to affect the sale or rental value of the realty, the measure of damages is loss of rental or market value before and after the nuisance, and the adequacy of legal remedy to be determined accordingly.

Webber, McCoy & Jones, for plaintiff.

Wilson & Rector, for defendant.

KINKEAD, J.

This is an action to enjoin the defendant from maintaining and operating its recently constructed roundhouse in such manner that the engines daily housed therein emit large quantities of smoke therefrom which is carried by the wind in and upon plaintiff's premises. The roundhouse is located in the factory district in the southeastern part of Columbus. The roundhouse cares for 80 or 90 engines per day, and the smoke is emitted from the engines, and not from a general stack.

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Plaintiff owns a fifteen acre tract of land which he has operated as a garden truck farm, and upon which he maintains and operates hothouses. The roundhouse was erected long after plaintiff acquired his farm. Plaintiff's house and home is located on the farm, the roundhouse having been constructed in such close proximity thereto that the smoke comes into the home of plaintiff rendering its occupancy inconvenient and uncomfortable.

1. *Defendant's Claim in Opening Statement That Plaintiff's Remedy at Law is Adequate.*

Defendant objected to proceeding to trial on the ground that plaintiff filed an action at law on the same day that this action was commenced wherein he asks recovery of \$10,000 damages. That action is still pending.

Defendant claims that the action at law constitutes a complete and adequate remedy at law.

Counsel for defendant contends that the mere filing of the action for damages is enough to warrant the court in refusing to interfere by the extraordinary remedy of injunction in the operation of the road. It was admitted that the evidence would undoubtedly show that smoke and soot was emitted, and that the wind carried it over plaintiff's premises when the wind was from the east. It was contended that it had not caused plaintiff to cease the green house business, but had probably caused him some inconvenience in living in the house where he resides.

It was contended that the injury that would be done to defendant by injunction would be irreparable, and would be far in excess of any injury which might come to plaintiff by the operation of the roundhouse.

Defendant's counsel invoked the doctrine of *comparative* or *balancing* injury which is applied in equity when the nuisance sought to be enjoined may affect the general public to a large extent.

Defendant's counsel contended that there could be no doubt that upon the mere statement of counsel that any damage whatever suffered by plaintiff may be compensated by

an action at law, and cited the case of *Goodall v. Crofton*, 33 O. S., 271, to the effect that injunction should not be granted unless a clear case of nuisance and irreparable injury be made out; that where a party complaining of a nuisance has an adequate remedy in an action for damages, he must establish his right to relief at law, before equity will interfere by injunction.

So it was insisted by defendant's counsel that the court should not proceed with the trial of this case; that at the very most if the court should not dismiss the action it should not be heard until the action at law already filed has been tried and the result thereof determined, all of which would be a guide to the equity side of the court in determining what, if any, relief by way of injunction should be allowed.

It was insisted in argument that whatever damages would be allowed, would be infinitesimal, and that the court would not be justified in stopping the operation of the roundhouse and the railroad because of the character of injury to plaintiff which might be disclosed by the evidence. (Some decisions have made the smallness of the damages, the basis of inadequacy of the remedy at law—while if trifling, it may be otherwise.)

Counsel for defendant contended that nothing more in the shape of a record or statement was needed than that presented to the court by the pleadings and statements of counsel, which should warrant the court in holding that it should not proceed on the equity side until there has been an injury of damages before a jury, and thus to find out what the result in the law case might be.

Counsel for plaintiff, however, earnestly insisted that plaintiff had the clear right to proceed at once in the equity case, which, as contended, was the only way the court could determine the rights of the parties.

This disclosed the matter submitted to the court.

2. *The Answer.*

Defendant contends that plaintiff has "a perfectly adequate remedy at law." The answer avers that long prior to 1916,

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with knowledge of plaintiff, defendant began the erection of the roundhouse; that he made no objection to its construction; it avers that the railroad is largely devoted to carrying coal and raw products to the several manufacturing concerns located in that vicinity; that to desist from the use and operation of its tracks, yards and roundhouse would cause great and irreparable injury to the public, and would be in violation of an Act of Congress and interfere with interstate commerce.

The answer also sets up the filing and pendency of the actions at law filed on the same day as this one in which the precise allegations are made as in this one.

It is made clear on examination of the law case, that plaintiff's petition treats the nuisance as continuing, not as permanent; \$10,000 damages being asked. In the equity case plaintiff alleges the total value of his premises to be \$40,000.

3. *Practice in Earlier Common Law.*

It was the practice in earlier common law and equity procedure for courts of equity to decline the exercise of jurisdiction by injunction before the legal rights of the parties had been heard and determined in an action at law. That was when there were two separate and distinct courts—the common law, and chancery courts.

The theory was that the rights of parties being legal, and equity taking jurisdiction only to furnish a more adequate remedy than that afforded by law, it was thought necessary that the legal rights be first determined by an action at law before equity should assume jurisdiction in cases of nuisance. So a distinction was earlier drawn between the exercise of chancery powers which were for temporary purposes and those which were permanent. Hence, a temporary injunction might be granted, but not a permanent or perpetual one till the legal rights were settled at law. *Irwin v. Dixon*, 30 U. S. (9 How.), 10, 28, 29; *Sutton v. Montfort*, 4 Sim., 365; *Kennerly v. Phosphate Co.*, 17 S. C., 411, 43 Am. Rep., 607.

This was a rule of expediency and policy, rather than an essential condition and basis of the equitable jurisdiction. I

Pom. Eq. Jur., Sec. 292; Pom. Eq. Rem. (2nd Ed.) Sec. 522, Sec. 1936.

From this early rule, adopted when courts of equity were separate and distinct from courts of law, came the idea that courts of equity might decline to exercise their extraordinary powers and jurisdiction until the legal rights of the parties had been first determined in an action at law. As stated in Pomeroy's *Equitable Remedies*, Sec. 1936 (Sec. 522) the grounds upon which the rule was based have disappeared by the union of courts.

The old doctrine of mere refusal by courts of equity to exercise jurisdiction solely on the ground that the legal rights of the parties should be first determined in an action at law is no longer of any consequences. This passed out when jurisdiction in law and equity was merged in the same court.

4. *The Modern Practice.*

Our courts now have no such power; it is as much the duty of a court to exercise its equity powers when properly invoked as it is to exercise its law powers. It can be excused from exercising its extraordinary equity powers only when it is made to appear that the legal remedy is *adequate*.

The limitation upon the power of the court to assume jurisdiction in equity is stated in *Goodall v. Crofton*, 33 O. S., 271, though in one respect inaccurately. It is there said that where a party complains that a business—lawful in itself is a nuisance—which affects his property injuriously, has an adequate remedy at law for damages, he must establish his right to relief at law, before equity will interfere by injunction.

The rule since the code is that a court of equity will not exercise its extraordinary powers of injunction if the remedy at law is *adequate*. That is the doctrine of that case. It is only when the remedy at law is *inadequate* in a *legal sense* that injunction will lie. To state that the complainant "must establish his right to relief at law, before equity will interfere by injunction," has reference to the ancient rule. Our courts of chancery now

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determine legal rights and grant relief in equity as the facts may warrant. Possessing equity powers our courts are competent to at once determine legal rights in cases of nuisance without a jury whenever jurisdiction is legally invoked, that is when the petition states facts disclosing the *inadequacy* of the legal remedy.

5. *Adequacy of Remedy Determined on Basis of Kind of Nuisance—Permanent and Continuing Nuisances.*

To determine the adequacy or inadequacy of the legal remedy, it is first essential to ascertain the character of the nuisance—whether *continuing* or *permanent*. On this question the decisions in the states in cases at law are deplorably conflicting. This court in the recent trial to a jury of *Atcheson v. The Farmers Fertilizer Company*, adopted the common law rule of distinction between the kinds of nuisances, repudiating all invasions, evasions or modifications of the rule made by some decisions. The common law doctrine has strong appealing force; it is so clear, sound and practical as to demand its approval and application. In substance this is the rule: when one builds a structure and uses it, operates or maintains it in such way as to make it a nuisance, the duty to remove the cause of nuisance is *imperatively* imposed upon the party, requiring him to abate the same, without unreasonable delay.

If it is within the power of the person by the exercise of skill and labor to abate the nuisance, he must do so. If he fails in his duty, but allows the same to continue, he is responsible for maintaining a *continuing* nuisance. One who is injured by such nuisance may prosecute an action at law for damages. If the nuisance affects the health only, there is no settled rule of making a pecuniary award, the amount of damages to be awarded resting in the discretion and judgment of the jury. But the damages for nuisances affecting property rights are fixed and definite, and the amount thereof is clearly ascertainable.

If one responsible for maintaining a nuisance is unable by the exercise of skill and labor to abate it, then it is to be re-

garded as permanent, because it will continue indefinitely without change. We do not follow those decisions which undertake to characterize the structure as permanent because of its nature and character, for the reason that rights and remedies are fixed solely upon the basis of *duty* and *obligation*. The right to engage in business is correlative or equal to the rights of others to do the same, or to build and own their own homes, or places of business or structures used for business. When one pursues his right to engage in business, to build and operate a factory, railroad and all equipment essential thereto, such as a roundhouse, the rights of all other persons in the same vicinity are equal and correlative so far as each may build structures and engage in business—the limitation or restriction of the law being that each is responsible for injury caused by reason of the conduct of their business, and bound by law to respond to the remedies which the law affords. That is the extreme limitation; keep this thought in mind in the study of this opinion. The remedies in cases of nuisance are clear and well defined, if we but learn and know how to follow them.

There is, however, diversity of opinion concerning the remedy by injunction against nuisances, as there is in respect to the remedy at law—which this court recently found in trial of *Atcheson v. The Farmers' Fertilizer Company* to a jury.

One may study decisions only to become confused on the sea of precedent due to conflict and lack of clarity in judicial expression. In exploring the earlier common law the student of legal history of English law will find conflict and uncertainty of judicial expression as in our own decisions. This is due to the inherent difficulty of applying a hard and fast rule to the distressing and aggravated kinds of nuisance which find their way into court. It is often difficult for courts of equity to decline to exercise its remediable intervention by the observance of strict procedural rules.

There has been careless regard for true boundary lines between adequacy and inadequacy of remedy afforded by law, as well as to the distinction between the kinds of nuisances, proper conception and application of which is essential to clarity of

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thought and decision. This has led to an improper conclusion, one manifestation of which is the assumption of equitable jurisdiction with little concern for questions of irreparability or adequacy of remedy. Remedial rights of parties must rest upon this distinction between the kinds of nuisance and the adequacy or inadequacy of the remedy at law.

The decisions do not uniformly give due regard to this distinction. It is common knowledge that there is probably more diversity of judicial expression on the subject of nuisance—a subject of much variety of conditions—than there is concerning other topics of law.

Our court of last resort has not within recent years exhaustively considered the subject.

It would seem that the confusion might be cleared by a simple illustration.

Every one has the right to use his own property as he chooses, being responsible for injury done to others. If an owner maintains a nuisance on his property which is injurious to others, and it lies within his power to abate it, he may be compelled to perform the duty to abate it by a proceeding in injunction. But if he can not abate it, because it is impossible to do so by the exercise of skill and labor, the owner having the right to use his property for any lawful purpose, and being responsible to pay compensation for any injury done, he must respond in damages for the injury. If the total value of the property is destroyed he must make full compensation, according to the rule fixed by law. If there is only partial destruction, compensation must be made upon that basis. If the property is of such peculiar value and advantage to the owner that money will not compensate the loss, then equity will furnish a remedy.

Therefore the adequacy of the remedy at law clearly marks the dividing line between law and equity. Any other test would not be consistent with settled principles of the law. This is the test of distinction between the kinds of nuisances, and of the appropriate legal remedy.

Adequacy of legal remedy is the determining factor in a proper conclusion of the right of a party to pursue the remedy at law or the extraordinary remedy by injunction.

6. *Court May Sua Sponte Suggest the Question—Facts to Be Pleaded to Disclose Right in Equity.*

In view of the objection made by counsel for plaintiff, it is interesting to note what is stated in Vol. 5 Pomeroy's Equity—being the first volume of Equitable Remedies at Sec. 1932 last edition (Old Sec. 518):

“And in courts of the United States, at least, this inadequacy is regarded as so important, that it may be insisted on by the court *sua sponte*, though not raised by the pleadings, nor suggested by counsel.”

It was raised by the pleadings and by counsel in the opening statement in the present case. Pomeroy in the same section calls attention to certain requirements of pleading. The right must be alleged clearly and definitely, so as to leave no ambiguity; facts must be alleged to show that the injury will be *irreparable*; plaintiff must allege *facts which show the injury and the inadequacy of his legal remedy*. To merely allege that an injury is irreparable is a conclusion; this is a common allegation, improper, futile, and present in this case.

The sole test of the right to proceed in equity is that the injury shall be *irreparable*.

The theory of plaintiff's action at law referred to in defendant's answer is that the nuisance is *continuing* and not *permanent*. The pleadings in that case have been examined and compared with those in this, the equity case; there are no facts alleged in either petition—law or in equity—which suggests the character of the nuisance—whether permanent or continuing. It is essential that this should appear in the chancery case so that the court may consider and determine the appropriate rule of damages to be applied in the legal action, in order to decide the question in the present case. The prayer for relief indicates the theory to be that the cause is for a continuing nuisance; this also appears from the opening statement of counsel.

The statements of counsel for defendants practically concedes that the nuisance is permanent. It was stated that the matter

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of abating the smoke nuisance had been considered, that a remedy might be resorted to at an expense of approximately \$100,000; but that even then there could be no certainty of its being effective.

On the subject of temporary or permanent nuisance, following the doctrine of *Railway v. Coleman*, 210 S. W., 947 (Ky. 1918, this court in *Atcheson v. Fertilizer Co.*, recently tried on the law side, charged the jury as follows:

“The test of whether a nuisance is temporary or permanent, depends upon whether the same can be *readily* abated by human skill and labor and at reasonable expense; if the cause or causes creating the nuisance can not be readily removed (at reasonable expense) by human skill and labor, then it is to be regarded as permanent.”

The Kentucky decision used the words “at reasonable expense” but this court omitted them in the charge. It rather seemed that the amount of the expense was immaterial. In *Paddock v. Somes*, 102 Mo., 226, 238, 10 L. R. A., 254, the court considered that it made no difference, that it did not in any measure operate as an excuse that the nuisance may not be obviated without great expense.

The inclination is towards the common law doctrine which imposes the imperative duty to abate the nuisance regardless of the expense. The law has ever been zealous in protecting the small property owner regardless of the expense required to abate the nuisance. The theory has been advanced by some decisions that to destroy the value of property by nuisance constitutes a practical taking, and that courts of equity will not permit such kind of taking. This suggestion by some old decisions in England and a few very early ones in this country has no place in the law of nuisance. Courts will strictly guard and protect the rights of both parties. There is no legal “kinship” between nuisance and eminent domain.

The harshness of the rule of nuisance has been equalized by the doctrine of “balancing of injury” which is applied under peculiar conditions which subject may be considered in the opinion.

7. *Whether Nuisance Permanent or Continuing the Vital Question.*

The question of vital importance in deciding the adequacy of the remedy at law, is whether the nuisance is permanent or continuing.

Discussion of the conflicting decisions in the different states which have been lately studied will not be made. It will not be of much benefit to consider the decisions which have devised some "makeshift" rule in order to hold a particular nuisance to be permanent, because of the *character* of structure, of an apparent purpose to continue a nuisance permanently. Text books and decisions recognize the irreconcilable conflict of decisions. In no wise professing superior wisdom, it may be stated that our industry and careful research rather than any degree of learning and our recent extensive and careful consideration of the question as disclosed by the decisions, Legal Dictionaries, adjudged words and phrases, and Webster's International Dictionary, brought to notice the simplest kind of a test of whether a nuisance is permanent or continuing. And it is the common law test which does not seem to have been always readily perceived. The *character* or *nature* of a structure as regards its permanent character is not the paramount question; it is relevant to the question only as it may disclose whether the cause of the nuisance may be abated by the skill and labor of man.

Designating nuisances as *permanent* and *continuing* according to the common law is now a convenient and practical method of classifying the two kinds of nuisance, the nature and character of which is dependent upon the primary cause of the particular case of nuisance. Such classification is also essential in considering the power and ability of man to change conditions or the nature of the structure with a view of abating the nuisance.

Courts have expended much labor in an endeavor to describe or define a permanent nuisance. Without unduly extending this already too long opinion it may be observed that the numer-

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ous decisions have not given due consideration to classes of nuisances and the basis thereof. The best authority is Webster's dictionary. There we find the word permanent to mean that a thing or condition—such as a nuisance—will continue *indefinitely, without change that varies its character*. And the judicial definition of permanent, as the word is used in law, is *Continuing in the same state, or without any change that destroys form or character, remaining unaltered or unremoved, continuing* (*Wash., etc., R. Co. v. Patterson*, 9 App. D. C., 423, 435; *Bank v. Town*, 44 Fed., 262-266).

Permanent nuisance does not import an injury which will continue *forever*, but means one which is something more than a mere temporary injury. (*Bassett v. Johnson*, 2 N. J., 184, 162.) The law recognizes the misleading character of the designation of an injury as permanent (120 N. C., 498); hence, this court characterizes it in a common simple way as one which is not contemplated shall continue forever, but only indefinitely, without change that varies its character.

Permanent nuisance *expresses the idea* that a nuisance may continue in the same state, unless the person obligated to abate it performs his duty and changes its form so as to destroy its character as a nuisance.

The classification adheres to and constitutes the basis of *substantive rights of action*. The basis of this division of *Rights of Action*, however, was the *character and extent of the injury done* to the right of property, regardless of the nature of the right. This division of nuisance constituted *the scope and extent of rights and causes of action to be stated in a petition filed in Court*, and marked the limits of recovery of damages. If the nuisance presented in court be shown to be *permanent in the sense defined by common law* as stated by the court, then the *plaintiff is entitled to recover at once and in one action all the damages he may sustain, present and future or prospective*.

If the injury be *temporary*, as distinguished from permanent; that is, if it is one which can be abated, but the defendant has failed continuously to abate it, it is temporary or continuing, in which case recovery of damages is limited to such

*damages as the complainant has temporarily suffered to the date of the action, and running back within the time prescribed by the statute of limitations, or from the date of creation of the nuisance, as shown by the evidence. If the injury and damage be intermittent, occasional, or recurring, and not permanent; or if the injury be continuing in nature, and if it be of such character that it may be removed by removing the cause thereof, by skill and labor, or is one which may be abated by the owner of the property, or which the party injured thereby may have abated in a proceeding in court; or the injury already inflicted is not of a permanent character, some courts hold that the owner himself may elect to remove the cause of the nuisance by repairing or reconstructing the structure rather than to pay damages for permanent injury. There are a number of decisions supporting such view. This court does not follow such a doctrine, nor does it cite the decisions. Some courts consider that if it lies within the power of the owner of property operated so as to constitute a nuisance it is to be supposed that he will remove it rather than suffer the entire damage it may inflict if permanent. *Hargreaves v. Kimberly*, 26 W. Va., 787; 53 Am. Rep., 121; *Aldworth v. Lynn*, 153 Mass., 53; Am. St., 528; and the common law is founded on this principle. In such case, and for the reasons stated, if it lie within the power of the owner by skill and labor to remove the cause, the nuisance is classed as continuing. And the measure of damages in such case is that which the injured party may have sustained by the nuisance up to the date of filing his action for redress, and within the period of limitation for filing the action, which in this state is four years, or from the date of the creation of the nuisance, if of shorter duration than the time covered by the limitation statute.*

This is the sole basis of the common law distinction between the two kinds of nuisances, that is the ability of man to abate the nuisance; and the rule is based upon the theory that it lies within the power of human skill and labor to remove the cause of continuance of the nuisance, and the ability of the person responsible to thereby abate the same by putting the structure

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in such condition, or by adopting such precautions, or by devising such methods or processes in the conduct of the business or manufactory that the cause of the nuisance may be thereby removed and abated.

In every case of nuisance, therefore, when it is within the power of the owner of property on which the same is maintained and exists to abate it, it is the duty of such owner by the exercise of skill and labor to abate the same. And equity will enforce the performance of that duty. The rule that a structure that will endure unless changed by the hand of man is a permanent nuisance, and one who is injured thereby must recover all damages, past, present and future in one action, has been criticized by an annotated note writer who questions the wisdom of decisions supporting the doctrine. L. R. Ann. 1916. E. 1047, N. 39. Especial attention is called to the cases of *Nashville v. Comar*, 56 Tenn., 415, 7 L. R. A., 101 Tenn, 465, and *Chattanooga v. Dowling*, 101 Tenn., 342, which it is claimed oppose the idea that a structure will remain permanent in character, unless its character as a nuisance can be changed by the hand of man. The note writer contends that the theory that a structure "will endure unless changed by the hand of man" "is not a good rule." The writer misses the point; and so do the Tennessee decisions as shown by a quotation in criticism of *Troy R. R. Co.*, 3 Foster, 82, viz.:

"Wherever the nuisance is of such character that it is necessarily an injury, and when it is a permanent character that will continue without change from any cause but human labor, then the damage is an original damage, and may be at once compensated."

It was appropriately observed in *Harvey v. R. R. Co.*, 120 Iowa. 472-3, that the confusion in the precedents touching the character of a nuisance arises not so much from proper principles as from an inherent difficulty in clearly distinguishing injuries which are original and permanent from those which are continuing.

The word *permanent* has reference not alone, and perhaps

not so much to the character of the structure causing injury as it does upon future use and conditions, and the power and ability of man to change its character.

Some courts have not perceived the meaning of the expression that a nuisance "will continue without change from any cause but human labor."

Every rule of law is based upon a duty; when one constructs anything which becomes a nuisance the law makes it his duty to abate it, if he can do so by the hand of man. If he is able to do so, but fails in his duty; he can be compelled by suit in equity perform his duty and to remove the cause of injury. If he fails to abate the nuisance, he may be enjoined from further maintaining it, unless he performs his duty; the injunction may be made conditional upon performance of his duty. The only way in which he may avoid the effect of the injunction is to perform the duty which the law imposes upon him to abate the nuisance and to change the structure if he can. If he can abate it, the nuisance is *continuing so long as he fails to perform his duty*. If he can not abate it by skill or labor; that is, if it be *not within his power to abate the nuisance*, then it will probably *continue indefinitely without change by the hand of man, and will therefore become permanent*. In that event the rights and duties will be determined upon the basis of the permanent character of the nuisance.

Of course there is a diversity of nuisances, but we are here dealing with a structure—a roundhouse—a smoke nuisance, which will continue indefinitely unless the railroad company takes steps to abate the nuisance; it will become permanent if it continues indefinitely without change.

The paramount thought in this opinion is to give expression to the original common law distinction between permanent and continuing nuisance, and to condemn innovations not based upon the true concept of the common law. A single individual, one who suffers injury by nuisance whose injury can be fully compensated by an adequate remedy at law, may not by the strong arm of equity stop the progress of inventive genius and public welfare so long as it is made to appear that he can be *adequately*

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compensated for injury sustained, simply because he stands upon the individual right of personal convenience or right of property. Equality of right justifies and warrants legitimate pursuit of business enterprise when redress at law may be granted for injury done. Each and every legitimate pursuit must receive legal sanction when injury to persons is allowed adequate redress at law, and when there is no ground or basis of equitable intervention. Parties litigant must be content with a legal remedy which is adequate.

8. *Question Upon the Pleadings and Opening Statements.*

Therefore the question to be determined upon the pleadings and upon the opening statements of counsel is, whether it is made clear that the nuisance complained of is *permanent* or *continuing*.

The claim of plaintiff in this respect must be made clear in order that the court may discover the appropriate rule or measure of damages, for the test of the adequacy or inadequacy of the remedy at law is whether the injury is irreparable.

To decide whether an injury is *irreparable*, it is essential that a court of equity be advised concerning the rule or measure of damages which will be applied at law in the trial of the action at law for recovery of damages.

The court is not advised by the plaintiff by averment of any fact or facts, nor by the statement of any fact in the opening statement, whether it lies within the power of defendant by skill and labor to abate the nuisance. If it is within its power to remove the nuisance, and fails to do so, the nuisance is continuing. If it is not within defendant's power to abate the nuisance it is permanent.

The court is advised by no fact nor by any statement on behalf of plaintiff concerning this matter.

Defendant's counsel, however, asserts that the matter has been considered, but that nothing can be done short of an expenditure of \$100,000 and even then it is said there is no certainty that the means adopted will be of any avail.

9. Matters of Common Knowledge.

It is understood that at every stage of trial constant use may be made of facts which are of common knowledge. The law is a human contrivance and outgrowth resting on human nature, human experience, and the principles that regulate human thoughts. Matters of common knowledge and common experience are the constant guide in many ways and matters in legal procedure. *Chamberlayne on Evidence*, Secs. 691-2, 694.

So is it known that in Cresline, this state, a three million dollar round house is being constructed with a stack running high into the air, with a suction apparatus drawing all the smoke from all the engines into the one stack discharging the same in the air so far above that the smoke does not cause annoyance as it does when it is discharged from each engine at a low altitude.

It is known that smoke regulations are now being undertaken in many cities under statutory provision. It is known that in Pittsburgh where there are many plants, the Pittsburgh bureau of smoke regulation has kept after all offenders against the smoke ordinance and has been instrumental in keeping up the standard of smokeless stacks so closely as the conditions and the weather permits. It is known that as results of court action there have been changes and methods of firing and the addition of temporary furnace changes resulting in smokeless stacks.

It is known that experts are contributing to scientific magazines on fuel consumption control by the United States Government. It is known that in Pittsburgh and other cities there is indication that fuel consumers are appreciating the value of smoke regulation.

Official notice and investigation has been made of the smoke nuisances in New Jersey which affect the comfort and repose, the security of life and health of a considerable number of persons in New York city. Litigation has been compromised by an understanding reached with companies whereby certain improvements will be installed which are expected to result in an effective abatement of the nuisance.

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It is known that beneficial results have come in Cincinnati from the work of the smoke inspectors and the efforts of the Smoke Abatement League in their effort to rid the city of the smoke nuisance.

It seems not improbable that plaintiff might make some showing even in his pleading, certainly in his proof, which would disclose whether the smoke nuisance charged against defendant is to be classed as permanent or continuing.

10. *Petition Must State Facts Showing Whether Nuisance Continuing or Permanent—Whether Legal Remedy Inadequate.*

It is essential that plaintiff should state facts showing whether his injury may be compensated or whether it is irreparable. It is the duty of plaintiff to make such investigation as will disclose whether any method or device may be adopted that will abate the smoke nuisance, and to allege facts in relation to the character of the nuisance. It seems probable that plaintiff may state facts which will disclose whether the smoke nuisance charged against defendant is to be classed as permanent or continuing. This is an obligation which rests upon plaintiff so that upon a challenge such as that made by defendant, the court may be advised whether the claim is that the nuisance is permanent or continuing, which is a pre-requisite to the determination of the adequacy of the remedy at law, which is the question now before the court.

The rule of pleading is well settled that the petition must show the nature of the right injured, the nature and extent of the injury, as well as that plaintiff has no adequate remedy at law, or that no adequate redress may be obtained at law, otherwise the plaintiff will be compelled to pursue his legal remedy. *Adams v. Michael*, 38 Md., 123, 17 Am. Rep., 516; *Wood on Nuisances*, Sec., 789.

11. *Inadequacy of Legal Remedy.*

The inadequacy of the remedy at law depends upon whether the injury done is irreparable in an equitable sense.

What then is meant by the term "irreparable?" There is confusion of thought and lack of uniformity of opinion on this subject. Bovier's Dictionary cites a definition taken from a Florida decision but which came originally from an old South Carolina decision, 3 Jones Eq., 177, the early decisions of which state have always been well regarded. It is as follows:

"But the meaning * * * is not that * * * (which is adopted by the courts of England or in this state); * * * the injury must be of a peculiar nature, so that compensation in money can not atone for it; where from its nature it may be thus atoned for, if in the particular case the party be insolvent and on that account unable to atone for it, it will be considered irreparable." *Indian River, etc., v. Trans. Co.*, 29 Am. St., 258, 259; 56 N. C., 177; quoting from 3 Jones, Eq., 177; 69 Am. Dec., 728.

The foregoing conception is probably too exacting. Rather should it be said that the irreparableness of injury depends more upon the nature of the right than upon the pecuniary loss suffered. (*Robertson v. Lorrie*, 77 Conn., 345); or that damages can not be estimated by an accurate standard, but only by conjecture (*College v. Tunburg*, 64 Wash., 19); or where the injury affects property either physically in the character in which it has been used, held and enjoyed; or when it has some peculiar quality or use, so that its pecuniary value may not fairly recompense the owner for the loss (*Dunker v. F. & T. Club*, 6 Cal. App., 524), or where it can not be measured by any certain pecuniary standard: (*Cleveland v. Martin*, 218 Ill., 73, 3 L. R. A., N. S., 629; *Water Co. v. City*, 127 Wis., 154; *Lead v. Inch*, 116 Miss., 467; Ann. Cas. 1913 B, 891), or permanent ruin to property (22 Colo. App., 332), or loss of health, the loss of trade, destruction of means of subsistence, or the ruin of property. (75 Fed., 703.)

By the term irreparable injury it is not meant that there must not be any physical injury or possibility of repairing the injury. All that is meant is that the injury would be a grievous one, at least a material one, and not adequately reparable

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in damages. *Sanderlin v. Baxter*, 76 Va., 229, 44 Am. Rep., 165; 124 Mich., 492, 50 L. R. A., 134, 83 Am. St., 329. (See Note 11 Am. Dec., 500, 85 Am. St., 137.)

Here we encounter difficulty.

We find from decisions maintaining the test of irreparable injury first on the fact that damages at law can not be estimated by an accurate standard; or that it may be done by mere conjecture; or where it can not be measured by a certain pecuniary standard.

If that should be the rule or test of the right to demand the extraordinary remedy of permanently enjoining one maintaining a nuisance, it would at once clarify the difficulty.

For instance if the nuisance is continuing because abatable; if it injures one in his enjoyment of his property so that he can not occupy it, the pecuniary standard or measure of damages is the loss of rental value—that is, the difference in rental value before and after the nuisance. That is the rule if the nuisance injures the property right; *quaere*, whether this is so when the injury is to the personal right of comfort. One could recover his damages every four years by action at law, although at any time he would have the right to proceed in equity to avoid a multiplicity of actions and enjoin the nuisance.

If on the other hand the nuisance is permanent the injured party may recover damages measured by the difference in the market value of the land itself before and after the nuisance.

If the injury is to the health, there is no definite rule of pecuniary award; it rests upon conjecture.

If the nuisance affects the personal comfort in the use and enjoyment of ones own property, while this is in the nature of a personal right, still it may probably be closely identified with the right of property that it will in reality affect the right of property itself. If one can not use and enjoy his own property as a home, then it might affect its value; that extends only to the property which strictly constitutes plaintiff's home.

If we were to follow the conception that an injury is irreparable only when there is no definite and certain pecuniary standard or measure of damages, there probably would be but a few

cases of nuisance coming within the jurisdiction of courts of equity.

In the present case the petition fails to state the portion of his property which actually constitutes his home; he says nothing about rental value or the market value of the part of his property actually constituting his home. No claim is made concerning this matter.

In respect to the soot and dirt on his hot houses, the plaintiff does not allege any facts sufficiently clear to show the nature of injury so as to disclose any measure of pecuniary award. It leaves the matter within the realm of conjecture. However it may be made certain by evidence as to particular reasons.

It is alleged that smoke and soot enters the windows and doors of plaintiff's residence, soils and blackens the bedding, curtains and household goods and supplies, becoming so noxious that the doors and windows must be kept closed to exclude the smoke and soot, causing discomfort, distress and injury to health.

It is claimed that the smoke and soot settles and collects on the glass of the greenhouses, excluding the sunlight and interfering with the growth of vegetables and plants, causing expense in repeatedly cleaning the glass.

It is also claimed that the soot and smoke settles and collects on plaintiff's vegetables and crops thereby rendering them unmarketable.

These are the specific injuries alleged, except, however, that it is not definitely shown how much of plaintiff's fifteen acre farm is thus affected.

Pomeroy Equitable Remedies, Vol. 5 Pomeroy's Equity (last Ed.) Sec. 1940 (Sec. 596), under the heading "Damage Necessary to Justify an Injunction" discusses the question of the amount and character of damage that is necessary to sustain an injunction. It is stated that the question "is settled by simply applying the rule which is applied on the same point in an action at law." He further states that:

"If the injury is irreparable or such that damages given by a jury would be conjectural, it is clear, of course, that the question of the extent of damages will not need to be gone into."

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This, too, seems to no purpose. The ever present rule is that equity furnishes its extraordinary relief only when the remedy at law is inadequate, or when the injury is irreparable in the sense that the injury can not be reparable because the relief which the law affords is inadequate.

There is one certainty of rule of procedure disclosed by judicial decision; that is, that relief in equity by injunction will always be granted to avoid a multiplicity of actions. But there can be no multiplicity of actions except when the nuisance is continuing, when more than one action may be brought to recover damages for the continuing nuisance. The theory is that to avoid multiplicity of actions, equity will compel one who maintains a nuisance to either abate it or to stop its maintenance.

But if the nuisance is permanent; if the same can not be abated by skill and labor, plaintiff in a legal action may be fully compensated. He may recover the difference in market value before and after the nuisance. If the owner can not sell the property for any purpose, he can recover its full value. If he can not sell it to be used for the same purpose to which the owner has put it, but can dispose of it for another and different purpose, whatever he may thus realize will disclose his damage. If he can realize as much on the sale of the property for a different purpose than that to which it has been previously put by its owner, then the owner suffers no damage.

If other land or property which is fit for the same purpose for which the owner has made of his land can not be obtained, then the owner might recover full value.

When the nuisance is shown to be permanent because it can not be abated there can be but one action; there can be no such thing as a multiplicity of actions in such case. One action must suffice for the reason that compensation allowed for a permanent nuisance is an adequate remedy unless for some special reason an owner might not be able to procure other property suitable for his purpose. This must be the law if we follow correct principles; no other course can be pursued unless we repudiate the rule that relief can only be had in equity when the legal remedy is inadequate. Ohio has an opportunity

to follow correct principles, instead of entertaining injunction proceedings regardless of whether a plaintiff may obtain adequate compensation. Its decisions have not yet covered the ground.

The purpose accomplished by injunction against a continuing nuisance primarily is to prevent its further maintenance unless the person maintaining it performs the duty enjoined upon him to abate the same. In the case of permanent nuisance the person maintaining it being unable to abate it, he must pay full compensation—that is enough to compensate the owner for the full value—deducting the amount which may be realized on a sale. It therefore appears that he has an adequate remedy at law. He can obtain all that his property is worth, the one responsible for the nuisance has equal right to engage in a lawful business, being liable for any injury he may cause, and being only bound to abate a nuisance if he can.

In the case of a continuing nuisance the jurisdiction of equity may always be invoked as long as the person does not perform his duty to abate the same. The power of equity to enjoin in such case does not necessarily rest upon the inadequacy of the remedy in damages at law, but instead may be based upon the principle of avoiding the bringing of more than one action at law for the recovery of damages for the continuance of an abatable nuisance. The question of irreparable injury is therefore of no essential consequence in cases of continuing nuisance, when the equitable remedy can rest upon this ground. It may be founded solely on the avoidance of a multiplicity of actions, but more especially upon the idea of compelling the performance of a legal duty by abating an abatable nuisance.

Certainly one can not proceed with two actions based upon the theory of a continuing nuisance. Plaintiff's law action is upon that theory. But this action seeking a permanent injunction does not disclose a definite theory; plaintiff fails to show whether it is an abatable and continuing nuisance, or whether it is permanent because it is not abatable. Plaintiff having filed two actions on the same date he can hardly complain of a multiplicity of actions since he has chosen to proceed

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with two actions at the same time, although he may have the right to enjoin the continuance of the nuisance and to recover damages sustained up to the date of commencing the action, if it be a continuing nuisance.

Plaintiff's petition is, therefore, demurrable for want of definite theory; it fails to disclose whether he claims the nuisance to be continuing or permanent. If his theory is that the nuisance can be abated, hence continuing, this action can be maintained on the basis of avoiding a multiplicity of actions; but he then should amend his petition and dismiss his action at law, for he may recover his damages in the equitable action, that is whatever may have been sustained to the date of the action. Authorities need not be cited upon a rule so well established.

If the theory is that this nuisance is permanent, it may be said that he has an adequate remedy at law in which he can be fully compensated for any injury sustained by recovery of the difference in the market value before and after the nuisance; that is, if he can sell his property for any price with the nuisance existing, he may then recover at law the difference between that price and the market value before the nuisance; therefore he is made whole. It is to be observed that plaintiff complains of injury to vegetable life and to the hothouse business. This brings the cause within the rule of damages for physical injury to property, not to mere right of enjoyment of personal comfort.

Or if plaintiff seeks the remedy in equity on other equitable basis, that is that the land has a special value for special purposes, and that he may not obtain other suitable land, allegation to that effect should be made. But even so, the legal measure of damages would seem to be adequate.

We have set forth the indisputable general doctrine and rule of procedure, that resort may be had to equity by injunction only when the remedy at law is inadequate—where the injury is irreparable unless equity is resorted to and the chancery powers of the court is invoked by granting its extraordinary relief.

We have shown how adequate the legal relief may be in cases of nuisance, those which are *continuing* or *permanent*, how the ordinary rules of damages operates, and how certain and definite are the rules of damages as to each, in so far as property may be affected.

It has also been shown how one who is injured by a permanent nuisance may be fully compensated to the extent of the value of his property.

It must be admitted that the courts of England and this country have been especially considerate of persons injured by nuisance. In the begining, English chancery courts granted temporary injunctions prior to the determination of the rights of parties in an action at law. Then equity courts assumed full and original jurisdiction over the wrong on the same basis as all other matters within judicial cognizance, on the ground of irreparable injury.

The propriety of resort to equity in case of a continuing nuisance which is abatable, and when the compensation at law would be entirely futile, is well illustrated in *Clowes v. Staffordshire Potteries Co.*, L. R. S. Ch. App., 125, where all that plaintiff could recover at law was the expense of a filter—that being the only thing to supply and install to abate a nuisance; the price of the filter was the utmost injury sustained. The remedy at law was held inadequate where merely nominal damages were recoverable, and where it might be necessary to bring a second or third action, it being then perfectly clear that the violation of duty on the part of defendant would be constantly going on, and that a court of law could not compensate the injury or stop the wrong. As expressed in this early case it was because it was most inconvenient to leave the rights of the parties to be thus determined. So the court concluded that a court of law could not compensate by damages, and considered this the best possible reason for interference by a court of equity. So it was considered that even though the rights be small, nevertheless even slight infringements should be watched with a careful eye, and repressed with a strict hand by a court of equity. *Clowes v. Staffordshire Potteries Co.*, L. R. Ch. App., 125; *Atty. Gen. v. Gas Co.*, 19 Eng. L & Eq., 648.

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Then the fact that a jury may give only nominal damages in case of either continuous or permanent nature which would be utterly inadequate to protect the right, furnished the best reason for equitable intervention on the ground of *irreparable injury*. *Clowes v. Staffordshire, etc., Co., supra*; *Wood v. Sutcliffe*, 8 Eng. Law & Eq., 271; *Ekmell v. Crowther*, 31 Beav., 167; *Rhodes v. Dunbar*, 57 Pa. St., 274, 98 Am. Dec., 221; *Wood on Nuisances*, Secs. 778, 779.

In addition to the inadequacy of the ordinary verdict for injury for a continuing nuisance, the injured party would necessarily be compelled to institute suits at law indefinitely to preserve his rights, therefore equitable intervention clearly warranted in granting relief by injunction, preventative or mandatory. *Van Bergen v. Id.*, 3 Johns Ch., 282, 8 Am. Dec., 511, and other cases cited by *Wood*, *Nuisances*, Sec. 779.

The rule from the beginning of equitable cognizance rested upon the proposition that if the legal remedy was inadequate to redress the particular injury resort to equity could be had. But if the legal remedy *was* adequate equity would not afford redress.

A mere diminution of the value of property by the nuisance, *without irreparable* mischief, was not considered sufficient; * * * or if an injunction would work great injury to one party, without corresponding benefit to the other, it was considered that it should not ordinarily issue, especially when an adequate protection can be had without it. *Id. Parker v. Winniseogee Co., supra*.

These doctrines it will be observed are taken from original fountains of law.

12. Concurrent Jurisdiction.

The courts have unconsciously drifted into the idea of concurrent jurisdiction in cases of nuisance, or at least parties come into equity without definite theory, and cases are heard and determined without due regard to the correct theory of procedure. Proceedings in injunction are often entertained when petitions therein do not present facts which disclose that the injury is irreparable. Chancellor Kent in *Gardner v. New-*

burgh, 2 Johns Ch. 162, 7 Am. Dec., 526, in dealing with a question of diversion or obstruction of a watercourse states:

“It is a clear principle in law, that the owner of land is entitled to the use of a stream of water which has been accustomed, from time immemorial, to flow through it, *and the law gives him ample remedy for the violation of this right*. To divert or obstruct a water course is a private nuisance; and the books are full of cases and decisions asserting the right and affording the remedy: F. N. B., 184; *Moore v. Browne*, Dyer, 319b; *Luttrell’s case*, 4 Co., 86; *Clynne v. Nichols*, Comb., 43; 2 Show., 507; *Prickman v. Trip*, Comb., 231.

“The court of chancery *has also a concurrent jurisdiction by injunction*, equally clear and well established, in these cases of private nuisance. *Without noticing nuisances arising from other causes* we have many cases of the application of equity powers on this very subject of diverting streams.”

Chancellor Kent cites *Finch v. Rasbridger*, 2 Vern., 390, where plaintiff’s right to enjoyment of a watercourse was quieted by injunction. After recital of this class of cases, the learned Chancellor observed:

“These cases show the ancient and established jurisdiction of this court; and the foundation of that jurisdiction is the necessity of a preventative remedy when great and immediate mischief or material injury would arise to the comfort and useful enjoyment of property. The interference rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interference of that right, which, upon just and equitable grounds ought to be prevented. 1 Vern., 120; *East India Co. v. Sandys*, Id., 127; *Hills v. University*, Id., 275; 1 Ves., 476; 2 Id., 414; *Whitchurch v. Hide*, 2 Atk., 391; 2 Ves., 453; *Atty. Gen. v. Nichol*, 16 Ves. Jun., 338.”

The learned Chancellor wrote this opinion in 1816, at which time the New York courts of chancery were separate and distinct from courts of law. He stated that:

“In the application of the general doctrine * * * to this case, it appears to me to be proper and necessary that the preventative

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remedy be applied. There is no need, from what at present appears, of sending the plaintiff to law to have his title first established.”

The order was merely a temporary injunction upon a bill of equity supported by affidavits, the Chancellor stating:

“I shall accordingly upon the facts charged in the bill, and supported by affidavits, as a measure *immediately necessary to prevent impending injury*, allow the injunction, and wait for the answer to see whether the merits of the case will be varied.”

Wood on Nuisances at Sec. 793 also states that:

“The jurisdiction of a court of equity over nuisances is concurrent with the jurisdiction of a court of law. (Citing Chancellor Kent.) *It will entertain complete jurisdiction in a proper case, where the bill and the proof makes a proper case for equitable relief, or will entertain a bill in aid of a court of law when an action to settle the rights of the parties is pending there, when the bill shows such a case of irreparable mischief as makes it proper to have the nuisance stopped until the rights of the parties are determined.* (Citing 3 Jur. [N. S.], 433; 1 M. & K., 154; 4 M. & C., 436; 1 H. & M., 573.) This species of injunction is called interlocutory, simply staying the nuisance during the pending of the litigation 53 Pa. St., 224; 2 Bland., 461; 20 Am. Dec., 3810 and is often issued as much for the protection of the rights of the defendant as of the plaintiff.”

Chancellor Bland in Murdock's case, 2 Bland Ch., 461, 20 Am. Dec., 381, in respect to the jurisdiction of chancery prior to Codes of Civil Procedure stated that:

“The only object of the conservative power of the court, as expressed in an injunction of this kind, is not to determine any controverted right, but merely to prevent a threatened wrong, or any further perpetration of injury, or the doing of any act thereafter whereby the right to a thing may be embarrassed or endangered, * * *. *The principal object of an injunction, in cases of this kind, is to prevent irreparable injury by preserving things in their present state; but if the injunction were to order anything to be pulled down or undone, it is obvious that*

it might be itself used as a means of producing that very kind of irreparable injury to the defendant which the bill charged him with being about to perpetrate against plaintiff. *Duvall v. Waters*, 1 Bland Ch., 569, 18 Am. Dec., 350. There are, however, some cases in which an injunction has been so framed as, apparently, to approach to the very verge of ordering a thing to be undone."

In discussing the character of injunctions allowed in equity in the old cases—whether preventative as distinguished from mandatory—the Chancellor in the last cited case did not command anything to be undone but merely that an injurious irregularity should not longer be continued, considering the continuance of the act a repetition of the act. Citing English cases, *Ryder v. Bentham*, 1 Ves., 343; *Robinson v. Byron*, 1 Bro. C. C. 588; Anonymous, 1 Ves. Jun., 140; *Lane v. Newdigate*, 10 Id., 1931; *Blakemore v. C. Canal Navigation*, 6 Cond. Cha., 544; *Eden Inj.*, 238.

This line of discussion concerning the old practice, where there was much contention as to a preventative or mandatory injunctions, was indulged in for the purpose of showing how there could be no exercise of concurrent jurisdiction by courts of law and equity. Injunctions against nuisances were usually in advance of trial at law for the granting of immediate relief, prior to trial at law.

The idea was that this preliminary proceeding could be pursued in equity to restrain acts or preserve the rights as they are while the action at law was proceeding to judgment. In this preliminary equity proceeding the final rights were not determined; it was maintained concurrently while the action at law was pending. But after the code there could be no such concurrent jurisdiction. The right to go into equity was then made to depend upon the adequacy of the remedy at law.

It was the settled rule of English Practice that although a *mandatory* injunction on an interlocutory or preliminary application was allowed with great reluctance, still the courts granted the same in proper cases. See Note 20 Am. Dec., 398, and cases cited. Preventative processes were usually granted rather than mandatory ones.

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Prior to code procedure American decisions in the main followed the English practice. Of course since the code all this disappeared, and cases of nuisance became subject to the general rule of adequacy of remedy at law.

We have taken the pains thus to go into the older practice for the express purpose of showing that jurisdiction over nuisances is not now concurrent in law and equity as Wood (Sec. 793) states, and to point out the misleading character of statement that a court of equity will "entertain complete jurisdiction in a proper case, where the bill and the proof make a proper case for equitable relief, etc.," as made by Wood, *supra*.

In a sense, under the old practice, it may be said that courts of equity could grant preliminary equitable relief; and could grant relief when the injury was irreparable. And it could grant permanent relief after the rights of parties had been determined in a court of law.

The statement, therefore, that courts of equity have *concurrent* jurisdiction with courts of law over nuisances does not mean that a party may go into equity or law by choice regardless of the kind of a case one may have. The condition precedent of resort to equity under the old as well as the present procedure was, and is, that plaintiff must show *irreparable* injury in order to invoke equitable jurisdiction.

This has ever been the rule, and is now the sole basis of the right to proceed in equity by preventative or mandatory injunction.

13. Ohio Decisions.

Statement has been made that we are exploring virgin ground in this matter so far as concerns our own decisions. Rather may it be said that our courts have not dwelt at length or gone into the difficulties connected with the subject, nor of the practicability of observing the distinction between the kinds of nuisances, and the correct foundation thereof. It is common practice for litigants to file a petition for injunction without setting forth the facts which will show whether plaintiff will suffer irreparable injury unless granted relief by way of in-

junction. Little concern seems to be given the essential distinction between the kinds of nuisances in practice, especially in pleading.

The earlier decisions gave effect to the primary essential that "equity will interfere" "where the injury is irreparable, going to the ruin or destruction of property"; that equity founds its jurisdiction on this principle, that it does not controvert the policy of the law. *McCord v. Iker*, 12 Ohio, 380 [1843] (before the Code). The cases of *Goodall v. Crofton*, 33 O. S., 271 (under the Code), 31 Am. Rep., 535, was founded upon the same ground of inadequacy of the remedy at law. The case of *Valley Ry. v. Franz*, 43 O. S., 623, uses language such as is found in decisions of other states which seek to class nuisances as permanent on erroneous grounds as when the injury "is done at once and to the full extent that the act will ever cause injury." *Crawford v. Rambo*, 44 O. S., 279 (1886), held that the court may order the abatement of an embankment "where an adequate remedy in the way of damages can not be had." This was a case of diversion of water; it is to be assumed that the nuisance was abatable, though the opinion is silent on this subject. In *Downs v. Clay Co.*, 9 C. C. (N. S.), 345, the court applied the rule that in case of a permanent nuisance and the damage could not be ascertained with reasonable certainty, and assessed in one sum, no injunction would be allowed, especially if it would be ruinous to the business of defendant and of small benefit to plaintiff.

The continuable and abating character of a nuisance was recognized in *Brewing Co. v. Schmitt*, 1 C. C. (N. S.), 177. The measure of damages in case of permanent nuisance was held to be the difference in market value of the property before and after the nuisance. *Brewing Co. v. Schmitt*, 1 C. C. (N. S.), 177.

Judge Shauck in *Iron Co. v. Hyland*, 74 O. S., 160, 166, stated:

"Within this limitation (that equity will intervene only where legal remedies are inadequate) a court of equity will enjoin a continuous or recurring nuisance when it is of such

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nature that there can be complete and adequate redress at law, and it should be conceded that to the adequacy of the legal remedy it is essential that the case be of such nature that full indemnity may be recovered without a multiplicity of suits. It is said, and truly, that the equitable remedy of injunction is now no more favored than formerly, but this means only that the propriety of the remedy is more appreciated and that courts of equity are more insistent that the legal remedy shall be in all respects adequate to justify the refusal of the injunction upon that ground. It does not mean that courts of equity have forgotten that they are administering a supplemental system, designed for the purpose of supporting the deficiencies of the law, or that this limitation upon their jurisdiction is immutably fixed by that purpose. * * * There is no such thing as an equitable nuisance. If the plaintiff has no cause of action at law * * * it can have none in equity, *and the jurisdiction of the courts of equity must be determined by the usual test respecting the adequacy of the legal remedy. That nuisances are frequently enjoined results from the fact that they are frequently, if not usually, of such nature as to present one of the recognized grounds of equitable jurisdiction, that is, that the injury is irreparable by the processes of the law or that a multiplicity of suits would be required at law to obtain redress.*”

In *Louisville Brick & Tile Co. v. Calmelat* (28 O. C. A., 356; 6 Oh. App. Rep., 435), the complaint was for nuisance by a brick, tile and clay product plant from which smoke, soot, cinders and gas were constantly emitted upon plaintiff's land and interfered with plaintiff's comfort. The opinion shows no special consideration of the principles of distinction between permanent and continuous nuisance. The chief question seemed to be one of limitation. The court said:

“If it is what, in law, is known as a permanent nuisance then the cause of action arose, etc.”

The opinion quoted from the petition describing the injury which makes claim only for rental value within the period of four years, and the court concludes therefrom that the same presents a claim for a permanent trespass or nuisance for which but one action for damages can be named. With due respect

for our friends of that court there is nothing found in the report of the case by which to determine whether it was a permanent or continuing nuisance. *City v. Hunt*, 19 C. C., 486, recognized the distinction between nuisances and the correct measure of damages for each form of nuisances.

There can be no doubt concerning the rule in this state, that resort can be had to equity in cases of continuing nuisance on the ground of multiplicity of actions, or in any case of nuisance because of the inadequacy of the remedy at law.

14. *Laches and Balancing Injury.*

Defendant raises the question of laches and balancing of injuries. There is no necessity for a decision of this question at this time, but the following observation is made.

However it is held that when a party is engaged in a lawful business, which is a nuisance to plaintiff, but plaintiff has been guilty of laches in standing by until after defendant has expended a large sum of money, it is held that the court may balance the injury and deny the injunction. *McCleary v. Highland Boy Gold Mining Co.*, 140 Fed., 951; *Brokaw v. Carson*, 74 W. Va., 340; *Herr v. Cent. Ky., Lunatic Asylum*, 110 Ky., 282; *Knoth v. Manhattan R. Co.*, 187, N. Y., 243; *Galveston, etc., R. Co. v. De Groff*, 102 Tex., 423; 21 L. R. A. (N. S.), 749.

In the following cases injunctions were refused because of the greater injury which would be suffered by defendant. *Bently v. Empire P. Cement Co.*, 48 Misc. Rep., 457, 96 N. Y. Supp., 831; *Raymond v. Transit Development Co.*, 65 Misc. Rep., 70, 119 N. Y. Supp., 655; *Downs v. Clay Co.*, 29 Okla., 329; *Lewis v. Pingree, etc., Bank*, 47 Utah, 35, 35 L. R. A., 1916 C. 1260.

Pomeroy's Equitable Rem. Sec. 1945 (last Ed. 1919) states, quoting—

“We think it may be safely assumed that the rule in equity is, that where the damages can be admeasured and compensated, equity will not interfere where the public benefit greatly outweighs private and individual inconvenience.”

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Daniels v. Waterunks, 61 Iowa, 549, and a large number of cases cited.

There are, however, strong cases to the contrary. *Townsend v. N. R. & L. Co.*, 105 Va., 22, 115 Am. St., 842.

The question of balancing injury has frequently and recently arisen where injunctions were sought against mines and smelters. Injunctions have been refused because it would result in closing large plants, and would inflict great loss on the defendants, their employees and communities dependent upon them, and where the damage to plaintiff was relatively small and of ascertainment. *Bliss v. Copper Min. Co.*, 167 Fed., 342; *affd. in Bliss v. Copper Co.*, 186 Fed., 789, 109 C. C. A., 133; *McCarthy v. Bunker Hill, etc., Co.*, 164 Fed., 927, 92 C. C. A., 259; *Copper Co. v. U. S.*, 142 Fed., 625, 73 C. C. A., 621 (injunction denied in suit by federal government).

On the other hand injunctions were granted in the following cases. *Am. Smelt. & Ref. Co. v. Godfrey*, 158 Fed., 225, 14 Ann. Cas., 8; 89 C. C. A., 139; *McCleery v. Gold Min. Co.*, 140 Fed., 951; *Georgia v. Tenn. Copper Co.*, 206 U. S., 230; *Arizona Copper Co. v. Gillespie*, 12 Ariz., 190; *People v. Smelter & Lead Co.*, 163 Cal., 84, Ann. Cas., 1913 E. 1267.

15. Conclusion.

In conclusion, what order should be made concerning the objections raised by counsel for defendant,

Pleadings must be founded upon a definite theory; the petition should aver facts which will disclose plaintiff's theory, whether the nuisance claimed be continuing or permanent.

This is necessary to determine whether plaintiff has pursued his proper remedy; whether he is entitled to a permanent injunction. Plaintiff has not stated sufficient facts to disclose that his legal remedy is inadequate; he has not stated sufficient facts to show that the nuisance is continuing.

The nature of a cause of action is determinable from the facts alleged, not by allegations of conclusions—as that an injury is irreparable—nor is it to be shown by the prayer of the petition. The petition is deficient in this respect.

If the nuisance is permanent, plaintiff's remedy at law is adequate because he can recover the difference in the market value before and after the nuisance.

If the nuisance is permanent, and there is a peculiar value in the property not measured by pecuniary award, and the owner can not get other property that will serve his purpose, the law sometimes takes this into consideration. No facts are now alleged to raise such question.

A party who recovers all that he is damaged by a nuisance, which he can do in the case of a permanent nuisance, should not be allowed to assume the position, as some English decisions have done, viz., *Dent v. Auction Mart. Co.*, L. R. 2 Equity 238, 246, 247, to seek relief because unwilling to take *any* compensation, and unwilling to submit the question to a jury, but insisting upon the right to determine the value of his own property.

Some decisions have been based upon the idea that one who builds a structure, factory or plant, which becomes such a nuisance that its maintenance and continuance amounts to a virtual taking; this the constitution forbids. This is not sound.

The court concludes upon hearing the statements of counsel and upon consideration of the petition that the same does not state a cause of action for the reason that it is not founded on a definite theory. Leave granted plaintiff to amend his petition.

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**INJUNCTION AGAINST USE OF SIMILAR NAME IN SIMILAR LINE
OF BUSINESS WITHIN SAME TRADE ZONE.**

Common Pleas Court of Hamilton County.

THE BIG STORE COMPANY, A CORPORATION, v. ARTHUR
LEVINE ET AL.

Decided, June 1920.

Unfair Competition—Joinder of Tort Feasors as Defendants—Case may Proceed Although Defendants have not all Been Served—In what Unfair Competition Consists—Use in a Secondary Sense of a Word Incapable of Becoming a Valid Trade-mark—Denial of Intent to Injure Without Avail.

1. Unfair competition is a tort.
2. Tort feasors are jointly and severally liable for their acts; the injured party may sue all or any number at his option, and the fact that the relief sought is equitable, does not change the rule.
3. In an action for equitable relief to restrain certain defendants from engaging in unfair competition, the facts that two of the defendants are beyond the jurisdiction of the court will not prevent a court of chancery from granting relief against those within its jurisdiction, provided it can be done without depriving those who are not before the court of substantial rights.
4. Section 11299 of the General Code, taken in conjunction with Section 11255, covers all classes of cases, and gives plaintiff the absolute right to proceed against defendants served when the liability is several, and leaves it to the discretion of the court to determine whether the action shall proceed against the defendants served when the liability is joint.
5. Where several defendants, some of whom are within the jurisdiction of the court, and some without, are engaged in acts of unfair competition against the plaintiff, a necessity exists for allowing the action to proceed against those within its jurisdiction.
6. Unfair competition consists essentially in the conduct of a trade or business in such a manner that there is an express or implied representation that the goods or business of one man are the goods or business of another.

7. If a person has established a business at a particular place, from which he has derived, or may derive, profit, and has attached to that business a name indicating to the public where or in what manner it is carried on, he has acquired a property right in the name which will be protected from invasion by a court of equity.
8. When the word is incapable of becoming a valid trade-mark, because descriptive or geographical, yet has come by long use to stand for a particular maker or vendor, its use by another in this secondary sense will be restrained as unfair and fraudulent competition and its use in its primary or common sense confined in such a way as will prevent a probable deceit by enabling one maker or vendor to sell his articles as the product of another.
9. The denial of intent to injure will not avail a defendant. Under proper circumstances the court will find in his acts evidence of an intent to defraud even in the face of his most explicit denial that he ever intended to pass off his goods as those of the complainant, and such intent may be, and often is, made out, not from direct testimony, but as a clear inference from all the circumstances, even when the defendant protests that his intention was innocent.
10. Where plaintiff had been engaged in the retail clothing business at Cincinnati, Ohio, for nearly twenty-five years, under the name "The Big Store," and during that period had expended large sums of money in advertising its business under that name, and built up a large and established trade in Cincinnati, Ohio, and surrounding cities, towns and territory, including Covington, Kentucky, situated immediately opposite Cincinnati on the Ohio River; *Held*, an injunction will lie enjoining the defendants from engaging in a similar business at Covington, Kentucky, under the name "Covington's Big Store," although plaintiff never actually conducted a store in Covington, but had a large and established trade among the residents of that city and adjoining territory.

Stricker & Johnson (Sidney G. Stricker, of Counsel), Martin M. Durrett and Nathaniel Wright, for Plaintiff.

Herbert Jackson and Bolsinger, Kuhn, Bolinger & Benham, for Defendants.

MATTHEWS, J.

This is an action by The Big Store Company against the defendants, Arthur Levine, Oscar Levine, Nathan Levine, David Levine, Harry Fram and Philip Fram, to enjoin them from continuing certain acts of unfair competition, and particularly from

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using the words "Big Store" in connection with their business located in the city of Covington, consisting of selling men's and boys' ready made clothing and other wearing apparel similar to that sold by the plaintiff at its store in the city of Cincinnati to customers residing in Cincinnati, Covington and surrounding territory.

The return shows that the summons had been served upon Arthur Levine, Oscar Levine, Nathan Levine and David Levine, and that the other defendants, to-wit, Harry Fram and Philip Fram were not found in this county. The case comes before the court upon the plaintiff's motion for a temporary restraining order against the defendants who have been served. These defendants have appeared in the case and oral evidence has been offered both on behalf of the plaintiff and the four defendants who were served with summons.

The evidence discloses very little conflict between the parties except as to the motives actuating the defendants and the consequences of their acts. The evidence shows, and it is admitted by the defendants that the plaintiff and its predecessors to whose rights the plaintiff succeeded, have been continuously engaged in the retail clothing business at 419 and 421 West Fifth street in the city of Cincinnati, Ohio, under the trade name of "The Big Store" since 1896, and that during that time they have established a large and increasing trade under that name among the residents of Cincinnati, Ohio, Covington and Newport, Kentucky, and the surrounding territory bounded by a circle, the center of which is in Covington, Kentucky, having a radius of five miles in length; that during the existence of the plaintiff and its predecessors they have spent more than \$500,000 in advertising their business in newspapers, and otherwise, circulated and circulating among the residents of said territory, and at the present time the plaintiff is doing a business annually under said trade name in said territory of more than \$1,500,000. and during the last six months it has made more than thirty thousand separate sales to customers residing in Covington and Newport, Kentucky, and other adjoining towns and suburbs within the designated territory located in Kentucky. During all that time the plaintiff has advertised and is

advertising its business in the newspapers that circulate most generally in the Kentucky cities and villages within said territory, and particularly within Covington and Newport, and in said advertisements its trade name of "The Big Store" has been and is being displayed prominently and by reason thereof plaintiff's business and merchandise is known to the public in said territory as "The Big Store," and the entire reputation of the plaintiff has been merged in those words to the elimination of the personality of those engaged in its business.

It is also conceded that all of the defendants acting together as partners, did in March, 1920, open a store at 16 Pike street, Covington, Kentucky, under the trade name of "Covington's Big Store," and since said date they have and are now engaged in business selling the same kinds of merchandise as that sold by the plaintiff under its trade name of "The Big Store." The evidence shows that the defendants are partners in that business, but it does not show the terms of the partnership agreement, or whether that partnership is for a designated period or at will. Since the defendants have been conducting their business they have advertised it under the name "Covington's Big Store" in the same newspapers in which the plaintiff has customarily advertised its business, and the advertisements of the two stores have appeared in the same issues of the same papers.

The evidence shows that some confusion has resulted from the use of the name "Covington's Big Store" by the defendants. Some mail directed to defendants has been delivered to the plaintiff and some bills for merchandise intended for the defendant have been charged to the plaintiff and some merchandise consigned to the defendant has been delivered to the plaintiff. There was proof of one or two other instances of persons mistaking the defendant's store for a branch of the plaintiff's store. These instances of confusion, it is claimed by the defendants, have resulted simply because of the fact that the defendants were just starting in business and had not notified the postoffice department and railroads of their address, and for other reasons which have and will cease when the defendants have become definitely established at their location in the public mind.

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The divergence between the parties as disclosed by the evidence is as to the motive which actuated defendants in selecting the words, "Big Store" and as to whether any confusion will in reality result from their continuing the use of those words. The defendants testified that they knew of the plaintiff's business at the time the trade name was selected; that they knew that it had established a large and profitable business under its trade name and that it had various customers who resided in Covington, Newport and other Kentucky communities, but that when their trade name was being considered and decided upon they had no thought of the plaintiff's business and of the use of the words "Big Store" by it, and that the words "Big Store" were selected by them simply because they appealed to their fancy. The other point of divergence rests more in argument as to what a rational prospective discloses will result from the use of these words as trade names by two competing establishments than in testimony as to what has actually transpired.

The rule of law governing unfair competition cases is broad, certain and well understood. It is that,

"No man has a right to use names, symbols, signs, or marks which are intended or calculated to represent that his business is that of another. No man should in this way be permitted to appropriate the fruits of another's industry or impose his goods upon the public by inducing it to believe that they are the goods of some one else."

Where the rule is violated a liability in damages is created and the further continuance of the unfair practices may be enjoined. Hopkins on Trade-marks, Trade-names, etc., 3 ed., p. 42.

As is said in Nims on Unfair Competition, 2 ed., p. 15:

"Unfair competition consists essentially in the conduct of a trade or business in such a manner that there is an express or implied representation that the goods or business of one man are the goods or business of another."

And also on the same page:

“If a person had established a business at a particular place, from which he has derived, or may derive, profit, and has attached to that business a name indicating to the public where or in what manner it is carried on, he has acquired a property right in the name which will be protected from invasion by a court of equity.”

And at page 25, the same authority says:

“The property rights in the good will of a business consists in part in the marks used on its goods, in its stand or locality, in its name, and all of these things are under the protection of a court of equity.”

The defendants have claimed that the words “Big Store” are descriptive terms not subject to appropriation as a trade-mark, and they as well as every one else, have the right to use those common terms of the English language. It is admitted, however, by the defendants that this term, “Big Store,” used by the plaintiff, has acquired in addition to the dictionary meaning of the words, a secondary significance in the community indicating the store of the plaintiff and embodying the reputation of the plaintiff’s store and the commodities it deals in.

Such being the state of the record, the law is that while the use of the words “Big Store” in their general and usual meaning can not be exclusively appropriated, the secondary meaning given to them by the plaintiff by reason of the user, is the plaintiff’s property, to which the defendants have no right.

As is said by Nims in his work on Unfair Competition, pages 67 and 68, quoting *Computing Scale Co. v. Standard Computing Scale Company*, 118 Fed., 965:

“When the word is incapable of becoming a valid trade-mark, because descriptive or geographical, yet has come by long use to stand for a particular maker or vendor, its use by another in this secondary sense will be restrained as unfair and fraudulent competition and its use in its primary or common sense confined in such a way as will prevent a probable deceit by enabling one maker or vendor to sell his articles as the product of another.”

The Drake Medicine Co. v. Glessner, 68 O. S., 337, is an instructive case on this subject.

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The state of the law now is such that it can be asserted that no matter what the trade-mark, trade name or other designation may be, if by long continued use it has come to represent in the public mind the business or commodity of a designated person, the use of it by another in such a way as to mislead the public into believing that it is dealing with the original user of the name when in fact it is not, will be restrained. And this doctrine applies to names used to designate the situs of a business. Some of the authorities on this subject are collected by Nims in his work at pages 82 to 86 inclusive, and he states the rule textually on page 82 as follows:

“Trade names are either local or fixed, or else transitory or personal in character—the one attaching to a place regardless of the ownership of the name at any one time, the other attaching to the person regardless of where the person locates himself. This distinction is important in cases involving names of hotels and buildings.

“The protection afforded by law is not limited to the exact or formal name implied by the one using it to identify his goods or his business. For instance a nickname by which a hotel has become known is entitled to such protection; for the use of such a nickname by a rival may work injury to the complainant's house and business. Some hotel names are personal names, others impersonal, certain of these names attach to a place, to a particular hotel regardless of its ownership; while others have been held to be the property of a person and to attach to him rather than the place.”

The author cites the case of *Woodward v. Lazar*, 21 Cal., 449, in which the defendants were restrained from using the name “What Cheer House” as the name of a hotel in the city of San Francisco. And on page 84, the author in speaking of the case of *Howard v. Henriques* (3d Sandf.) N. Y., 725, says:

“It appears that the plaintiff's hotel was called the Irving House, but it soon became generally known as the “Irving House” and “Irving Hotel” indiscriminately. The defendants named their house “Irving Hotel.” There was no question of resemblances between the two hotels, or the two signs. It was the good-will represented by the name that was protected, not merely the name.”

In the case at bar, in view of the fact that the plaintiff and defendant are advertising their business in the same newspapers circulating among the same people, it seems to the court that it is inevitable that confusion in the public mind will result and that that confusion will progress in proportion to the growth of the defendant's business; that readers of the advertisements will carry in mind the name "Big Store" long after the location has passed from their minds and in the dissemination of the advertising information, persons influenced either directly or indirectly by the advertisements of one store will through inattention, lapse of memory, and direction by others not knowing which store the inquirer desires to patronize, be directed to the wrong store, and as the defendant's business grew it would itself suffer from such confusion misleading the public intending to deal with one or the other store.

The court does not pass upon the question of whether there was an actual intent to secure a part of the good-will of the plaintiff by the adoption of this name by the defendants. In the opinion of the court the actual intent is not material, the act is to be judged by its natural ordinary consequences and the defendants legally are chargeable with the intent to produce such consequences.

As is said in the case of *Thum Co. v. Dickinson*, 245 Fed. Rep., 609, at 621 and 622:

"It is not necessary to prove intent by direct evidence, where it is clearly to be inferred from circumstances. * * * Further, in our judgment, the resemblances and confusing features shown in respect of defendant's output are themselves calculated to lead users to believe that it is the plaintiff's output and so to deceive them, and such consequences, inevitable in their nature, justify an inference of wrongful intent to secure 'some part of the benefit of the good-will and reputation of the plaintiff's trade.' "

The same rule is stated in *Nims on Unfair Competition*, at page 622, in this language:

"The denial of intent to injure will not avail a defendant. Under proper circumstances the court will find in his acts evi-

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dence of an intent to defraud even in the face of his most explicit denial that he ever intended to pass off his goods as those of the complainant, 'and such intent may be, and often is, made out, not from direct testimony, but as a clear inference from all the circumstances, even when the defendant protests that his intention was innocent.' "

At page 623:

"Assuming that up to the time an injunction is asked the defendant has acted with entire good faith, firmly believing that he was causing no injury to the plaintiff and usurping none of his rights, still he will be enjoined."

The books teem with authorities illustrating the application of the rule of unfair competition to specific cases, but it would be of no service to cite these authorities at length. The court contents itself with citing two cases bearing a strong resemblance in facts to the facts in the case at bar. The first is the case of *Cady v. Schultz*, 19 R. I., 193, in which the defendant was enjoined from using the words "U. S. Dental Rooms" in a place adjacent to Providence; the court holding that the plaintiff having for several years conducted his business in Providence under the name "U. S. Dental Association," had acquired the right to the use of that trade-name so as to exclude others from using a similar name in the same kind of business within the territory in which the plaintiff had customers.

The second case is that of *Samuels v. Spitzer*, 177 Mass., 226, in which the facts were that the plaintiff located in Rhode Island, had advertised his business under the trade-name "Manufacturers' Outlet Company" over a wide territory including the southwestern part of Massachusetts, in which the city of Taunton was located. The defendant commenced business in Taunton under the name of "Taunton Outlet Company," and the court held that a bill in equity alleging the facts and that the public was being thereby deceived and trade diverted from the plaintiff to the defendant, stated a good cause of action.

So, the court holds in this case that the plaintiff is entitled to the use of the words "Big Store" as a trade-name within the

territory in which the defendant's store is located; that the defendant in using the trade-name, "Covington's Big Store," under which to conduct its business of a similar nature, is infringing the rights of the plaintiff, and that the plaintiff is entitled to a temporary restraining order enjoining the defendants from continuing to conduct their business under said name containing the words "Big Store" by themselves or in combination with other words.

The defendants have objected to the court assuming jurisdiction in this case for the reason that the defendants are partners whose place of business is located outside of the territorial jurisdiction of the court, and all of the defendants have not been served. It appears by affidavit and by oral testimony that the two unserved defendants reside in Kentucky, and that they are members of the partnership conducting the business under the trade-name "Covington's Big Store." At no place does it appear that that partnership is more than a partnership at will. In the opinion of the court jurisdiction of this cause, so far as the defendants served are concerned, exists for the following reasons:

1. The claim asserted by the plaintiff against the defendants is for the violation of a right available against the entire world, and is therefore an action based on a tort. This fact is recognized by all the text writers and is found stated in the cases on the subject.

In *Thum v. Dickinson*, *supra*, Judge Warrington, at page 623, said:

"And it is the settled law that *tort actions like these* can not be successfully defeated upon the ground that plaintiff has violated the laws prohibiting monopolies, etc."

So also, to the same effect, *Bissell Chilled Plow Works v. Bissell Plow Company*, 131 Fed., 357; *Vacuum Oil Co. v. Eagle Oil Co.*, 122 Fed., 105, at page 106. The liability being based upon tort is according to fundamental law joint and several, and where a joint and several liability exist a plaintiff may sue one, all or any number at his option, and the fact that equitable

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relief is sought against the tortfeasor does not change the rule.

2. The action being one for equitable relief, would in the absence of statute, be governed by the rules of equity relating to necessary parties, and two of the defendants being out of the jurisdiction of the court and that fact being shown by the return of the summons, a court of chancery would proceed to grant relief against those before it, provided that could be done without depriving the parties not before the court of substantial rights. The equitable rule on the subject is stated in "Mitford's and Tyler's Pleadings and Practice in Equity" at page 21 as follows:

"Where persons interested are out of the jurisdiction of the court, it is sufficient to state the fact in the bill, and to pray that process may issue on their return; and if the statement be proved at the hearing, their appearance will be dispensed with. But whether the court can decree in their absence, depends on the nature of their interest, and the manner in which it will be affected by the decree. If they are to be active in performing the decree, or if they have rights entirely distinct from those of other parties, the court can not, in their absence, decree against them. But if they are only passive objects of the decree, or their rights are merely incidental to those of the parties before the court, a complete adjudication can be made in their absence."

Tested by this rule, even in the absence of a statute, a court of equity would have jurisdiction to grant the relief sought against the defendants served. They are to be restrained only from appropriating the property right of the plaintiff in the secondary meaning of the words, Big Store. The evidence does not show that the absent defendants have any right to require the present defendants to continue to use the words, the Big Store in their secondary significance. It does not appear that there was a contract of partnership between the defendants to conduct a business in Covington for a definite unexpired period under the one partnership name of "Covington's Big Store." The defendants before the court, therefore, could of their own motion decline to continue this business under the name "Covington's Big Store," and would by so doing violate no right of

the absent defendants. The defendants before the court having that right as against the absent defendants, and the court having found that it is their legal duty to refrain from using said name, the decree of the court requiring the present defendants to perform their legal duty, violates no right of the absent defendants. Four of the six partners of this partnership are before the court and these four, being a majority, completely control the internal affairs of the partnership, except in so far as restrained by the express terms of the partnership agreement; 20 Ruling Case Law, page 75.

The equitable rule of proceeding in the absence of parties who are beyond the jurisdiction of the court was applied in the case of *Sippile v. Albites*, 5 Abbott's Practice Rep. (N. S.), 76, to a case of partners, and at page 78, the court states the rule as follows:

"It is a familiar rule of equity that where a person who ought to be a party is out of the jurisdiction, and the fact is admitted or proved, that of itself constitutes a sufficient ground for dispensing with his being made a party, and the court will proceed to a decree without him. This rule is not confined to mere nominal parties; and it is well settled that even in the case of one partner residing in a foreign country, the court will proceed to make a decree against partners within the jurisdiction, provided it can be done without manifest injustice to the absent partner."

3. Jurisdiction is expressly conferred by Section 11299 of the General Code, which provides:

"When service has been made on one or more defendants, but not on all, the plaintiff may proceed as follows:

"1. If the action is against defendants jointly indebted upon contract, against the defendants served, unless the court otherwise directs.

"2. If the action is against defendants severally liable, without prejudice to his rights against those not served, against the defendants served."

This section taken in conjunction with Section 11255, covers all classes of cases and gives plaintiff the absolute right to pro-

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ceed against defendants served where the liability is several, and leaves it to the discretion of the court to determine whether the action shall proceed against the defendants served where the liability is joint.

In the case of *Yoho v. McGovern*, 42 Ohio St., 11, the court applied Section 11299 to an action against two joint makers of a promissory note, one of whom was served and the other was not served because he was a non-resident, and the court there held that the action could proceed to judgment against the joint debtor served with summons, and said:

“A careful examination of the authorities will demonstrate that the principle upon which this rule is grounded is that if one of several joint contractors is beyond the jurisdiction of the court—out of the reach of its process—this creates a necessity of allowing the action to proceed against those within the jurisdiction, and this without affecting the liability of the former, in order to avert an entire failure of justice.”

Assuming a joint liability because of the partnership relation among the defendants, this court will still hold that a necessity existed for allowing the action to proceed against those within the jurisdiction, for the reason that the same objection to jurisdiction could be raised no matter in what court the action was instituted, and to refuse to assume jurisdiction would be to deny relief altogether, and that therefore, the provision in Section 11299 General Code, which gives the court power to veto the determination of the plaintiff to proceed against the defendants served should not be applied.

Counsel for defendants rely upon the case of *Penn v. Hayward*, 14 Ohio St., 302. In the opinion of the court that case is not an authority against the position taken by the court in this case. In that case the court expressly found that there was no necessity for the Ohio court to assume jurisdiction, and inasmuch as complete relief could not be awarded in the absence of non-resident defendants, the court exercised its discretion and refused to assume jurisdiction. As is said in the second paragraph of the syllabus, the court held:

“But where part only of the persons from whom such conveyance is required are residents of the state, and the court has not acquired jurisdiction over the persons of the non-residents, so that complete relief can not be had in that suit, the case will be dismissed, *especially where no real necessity exists for trenching upon the rule discountenancing a multiplicity of suits.*”

It will be noticed that the court does not say that the Ohio court did not have jurisdiction to proceed. All it held was that inasmuch as complete relief could not be granted, the case should be dismissed since there was no necessity shown for assuming jurisdiction, and that to assume jurisdiction would cause a multiplicity of suits. And at page 307, the court pointed out that another court had jurisdiction to settle the entire controversy, saying:

“The courts of that state have jurisdiction over the land itself and can therefore do what we are unable to accomplish—settle the entire controversy in one and the same proceeding.”

The facts in the case at bar are the direct antithesis. A necessity does exist for assuming jurisdiction in order that there may not be a failure of justice, and assuming jurisdiction will in no wise result in a multiplicity of suits.

A temporary restraining order may be prepared enjoining the defendants served with summons in this action from continuing to use the words “Big Store” alone or in combination with other words as designating their store dealing in commodities of the same character as those dealt in by the plaintiff within the territory in which the plaintiff has established a secondary meaning for the words “Big Store” as shown by the evidence adduced upon the hearing of the motion for a temporary restraining order.

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Cozart v. Cozart.

**JURISDICTIONAL FACTS IN ACTIONS FOR DIVORCE
AND ALIMONY.**

Court of Common Pleas of Hamilton County.

GOLDIE COZART, A MINOR, ETC., v. JESSE ELMER COZART.

Decided, June, 1920.

Pleading—In Actions for Divorce and Alimony—Verification not a Bar to Evidence as to Residence in the County for the Thirty Days Before Filing of the Petition.

1. To confer jurisdiction in an action for divorce and alimony, wherein the plaintiff has not been a resident of the county for the thirty days immediately preceding the filing of the petition, an allegation becomes necessary that the cause of action arose in the county in which the suit is entered.
2. Verification of the petition does not preclude plaintiff from introducing evidence to the effect that she had been a *bona fide* resident of the county for the thirty days immediately preceding the filing of the petition.

HOFFMAN, C. W., J.

In an action for divorce or alimony the petition must allege jurisdictional facts in conformity with the provisions of Section 11980 of the General Code. It is necessary that the petition state that the plaintiff has been a resident of the state for at least one year and a *bona fide* resident of the county for thirty days immediately preceding the filing of the petition. If, however, the plaintiff has not had a *bona fide* residence in the county for thirty days immediately preceding the filing of the petition there must be an allegation that the cause of action arose in the county in which the suit is entered. An allegation in the petition that "the plaintiff has been for more than one year last past a *bona fide* resident of Hamilton county, state of Ohio," is sufficiently comprehensive under Section 11980 to confer jurisdiction to hear and determine the cause in Hamilton county.

In the case under consideration the petition states that:

“The plaintiff, Goldie Cozart, says that she is now and has been for more than one year last past a *bona fide* resident of Hamilton county, state of Ohio.”

Notwithstanding that this allegation is sufficient to confer jurisdiction, counsel for the defendant contends that the petition was not filed until twenty-three days after it was signed and sworn to by the plaintiff.

In a suit for divorce and alimony judgment can not be taken by default without evidence.

No verification of the petition is required—Section 12093 of the General Code. If, however, the petition be verified this does not preclude the plaintiff's adducing evidence showing that at the time of the filing of the petition she was for thirty days previous thereto a *bona fide* resident of the county.

The allegations of the pleadings “are taken to refer to the conditions as existing at the time of the beginning of the action unless otherwise stated.” Vol. 1 Bates Pleading and Practice, page 462.

If at the time of the hearing of the cause the jurisdictional facts are sustained by the evidence, it is immaterial that at some time previous to filing the petition it was verified by the plaintiff.

The motion for a new trial is overruled.

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INCREASE OF JUDICIAL SALARIES DURING INCUMBENCY.

Common Pleas Court of Cuyahoga County.

THE STATE OF OHIO, EX REL HOMER G. POWELL ET AL, V. JOHN A ZANGERLE, AS COUNTY AUDITOR OF THE COUNTY OF CUYAHOGA, STATE OF OHIO.

Decided, June 14, 1920.

Constitutional Law—Construction of the Provision that Judicial Salaries shall not be "Increased" during Term of Office—Application of the Rule of Reason in the Light of the Common Welfare—Legislature at Liberty to Increase or Diminish Judicial Salaries as Exigencies of the Time may Require—Tendency of the Times toward Home Rule.

1. The Constitution of Ohio permits an increase during incumbency of that part of the salaries of common pleas and superior court judges which is paid by the counties or municipalities.
2. The act of February 4, 1920 (Section 2252 General Code), which provides for such increases and became effective May 24, is a valid act, and applies to all common pleas and superior court judges, and not to those only who are elected subsequent to that date.

CRITCHFIELD, J., of Wayne county, sitting by assignment of Chief Justice Nichols.

This is a proceeding in mandamus instituted in this court by the relators who are all the judges of the court of common pleas in Cuyahoga county, Ohio, with the exception of one judge, who is sick and not in the state.

The petition asks for a writ of mandamus compelling the defendant, John A. Zangerle, as auditor of Cuyahoga county to issue a warrant on the county treasury in favor of each of said relators for a certain sum of money alleged to be due them as part of their salary as common pleas judges now due and payable.

To this petition the defendant has entered his appearance

and through the prosecuting attorney of the county has filed his demurrer to the petition:

1. That the petition does not state facts sufficient in law to constitute a cause of action.

2. That said petition does not state facts sufficient to entitle relators to a writ of mandamus or any relief as prayed for.

In the oral arguments based on this demurrer, it was agreed by the attorneys on both sides that the real question at issue in this case is, whether or not a certain increase of salary for common pleas judges, authorized by the Legislature by a bill enacted on the 4th day of February, 1920, and operative on the 24th of May, 1920, was due and payable to all the judges of the common pleas court within the limits of its terms, or whether it was only payable to those who should be hereafter elected or appointed common pleas judges in said state. No other question is raised or intended to be raised by the demurrer of the defendant, and no other defect is desired to be relied upon if any should exist, such as joinder of parties or the specific time when said sum should be payable, if it applies to present judges, that is, whether it should be payable every three months out of the county treasury or oftener.

The act in question which became an operating law on May 24, 1920, was an act to amend Sections 1529, 2251, 2252, 2253 of the General Code, to provide for an increase in salaries for the judges of the supreme court, court of appeals, common pleas and superior courts of the state, and for their expenses in the performance of their official duties. Section 2251 of this act provides among other things:

“That judges of the common pleas and superior courts shall receive as annual salaries, each, \$3,000.”

Section 2252 of this act provides that,

“In addition to the salary allowed by Section 2251, each judge of the court of common pleas and of the superior court, shall

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receive an annual compensation equal to twenty-five dollars for each one thousand population not in excess of one hundred and twenty thousand, of the county in which he resided when elected or appointed, as ascertained by the federal census next preceding his assuming the duties of such office. In no case shall any additional salary be more than five thousand dollars and such additional salary shall be paid quarterly from the treasury of said county upon the warrant of the county auditor."

The relators claim in their petition that under and by virtue of the terms of this act of the Legislature, passed Feb. 4, 1920, they are entitled in addition to the salary received from the state of \$3,000, an annual compensation to be paid by Cuyahoga county of \$5,000, and that the auditor of the county has refused to certify or allow any compensation to be paid by the county in excess of \$3,000. Hence relators bring their action in mandamus. The true purpose, as I have stated, is to test whether this salary is due to every judge now holding office, or only to such judges as will be elected or appointed after said 24th day of May. The Constitution of the state of Ohio is involved in this discussion.

Section 14, Article IV, of the present Constitution of Ohio reads as follows:

"The judges of the supreme court, and of the court of common pleas shall, at stated times, receive for their services such compensation as may be provided by law, which shall not be diminished or increased during their term of office; but they shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state or the United States. All votes for either of them, for any elective office, except a judicial office, under the authority of this state, given by the General Assembly or the people, shall be void."

Under our system of American jurisprudence a Constitution is the organic law of the state as distinguished from the statutes made or enacted by the Legislature acting under and limited by the order of things thus constituted; or, in other words, under the authority conferred by the Constitution.

By "construction" or "interpretation" of the provisions of the Constitution, or a statute, is generally meant that intelligent reading, with explanation such as defines the meaning of the words used.

Cooley on Constitutional Limitations, 7th Ed. page 70, says:

"The deficiencies of human language are such that, if written instruments were always prepared carefully by persons skilled in the use of words, we should still expect to find their meaning often drawn in question or, at least, to meet with difficulties in their practical application. When the draftsmen are careless or incompetent, these difficulties are greatly increased."

Interpretation is ordinarily the art of finding out the true sense embodied in any form of words, or the sense which the author intended to convey while construction may be said to be the drawing of conclusions respecting subjects that lie beyond the direct expressions of the text, from elements known from and given in the text; conclusions which are the spirit, though not within the letter of the text.

"In construing a statute, it is the duty of the court to give effect to the legislative intent. True, the intent of the Legislature is to be determined from the language employed, and when that language clearly expresses the intent of the law-making body, it should be given its plain, ordinary meaning, for it is not a question what the law-making body intended to enact, but rather the meaning of that which it did enact. Where, however, the meaning is doubtful the history of legislation on the subject may be considered in connection with the object, purpose and language of the law, in order to arrive at its true meaning." *Erie R. R. Co. v. Steinberg*, 94 O. S., 203; *Slingluff et al v. Weaver et al*, 66 O. S., 621.

The rule of construction and interpretation as applied to constitutions, is practically the same, with perhaps this exception; a constitution does not derive its force wholly from the convention which framed it, but from the people who adopted and ratified it, and it must be presumed that the people accepted the words and language used in the sense most obvious to the

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common understanding, and ratified the instrument with the understanding that this was the sense designed to be conveyed by the framers of the instrument. This being true, the proceedings of a constitutional convention may perhaps be less conclusive of intent than are legislative proceedings. However, the history of calling the constitutional convention, and the causes which lead to it, and the debates or discussions before the people at the time of the election of the delegates or members of the convention are undoubtedly quite instructive as well as what was said by the members of the convention at the time of the adoption of the Constitution itself or of the particular section under consideration. Or, in other words, it is always proper to inquire what was the mischief intended or designed to be remedied, as well as the purpose sought to be accomplished by any particular provision found in a state Constitution; and to that end, it is entirely proper and often quite illuminating to examine the proceedings of the convention which framed the instrument. As was said in *Cass v. Dillon*, 2 O. S., 607:

“We can not treat the Constitution as a series of mathematical axioms from which none but infallible deductions are admissible; nor can we yield our assent to every deduction that may be logically drawn from any one of its generalities. We regard it as a law, subject to the imperfections of legislation in the construction of which as in all other laws the intent of the law giver must, if possible, prevail.

It may be said that statutes have not the same flexibility and rigidity necessarily incident to constitutional provisions, but, nevertheless, the rules of construction or interpretation, with the exceptions pointed out, are practically identical, and this construction and interpretation depends in large measure on the common law and prior constitutional provisions, which are superseded by the provisions or sections under consideration. These rules of construction or interpretation, as gathered from the best authorities so far as the present discussion is concerned, may be thus briefly summarized:

First. Constitutional provisions are to be construed, not according to their letter but according to the object, purpose, and intention the members of the constitutional convention and the people had in view in framing and adopting them.

Second. Consideration of the constitutional provision superseded by the constitutional section or provision under consideration with a view to a determination of the defect or mischief, if any, against which the superseded section did not provide.

Third. Is the superseding section a remedy against a then existing evil to the state, and if so, the reason of the remedy?

Fourth. Other provisions of the Constitution, *in pari materia*, must be given due and careful consideration.

Fifth. Where a constitutional provision is general, as relating to a class, *everything necessary to make the provision effectual is implied*.

Sixth. A later provision repeals or supersedes an earlier only so far as they are repugnant. If they may stand together it will not be presumed the convention, in framing, or the people, in adopting, the later provision intended to change in material respects the organic law.

Seventh. There is a presumption against what is positively inconvenient and unreasonable.

It may be said, in passing, that the "rule of reason" of which much has recently been written and said, especially in federal decisions, is based upon the last given rule of construction.

The rule of reason must never be lost sight of, in construction or interpretation of a constitutional provision or of a statute; and that simply means that a reasonable construction is what the provisions of the statute under consideration demands, and should receive.

"And the real question is, what the people meant, and not how meaningless their words can be made, by the application of arbitrary rules." Cooley, Const. Lim., 95.

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It may therefore be profitable to refer to the constitutional provision of 1802, relating to the term of office and salaries of judges. Section 8 of Article III, of that Constitution reads as follows:

“The judges of the supreme court, the presidents and the associate judges of the courts of common pleas, shall be appointed by a joint ballot of both houses of the General Assembly and shall hold their offices for the term of seven years, if so long they behave well. The judges of the supreme court and the presidents of the courts of common pleas shall, at stated times receive for their services an adequate compensation to be fixed by law which shall not be diminished during their continuance in office; but they shall receive no fees or perquisites of office, nor hold any other office of profit or trust under the authority of this state or the United States.”

It will be noticed by the provisions of this section, that the judges of the supreme court, and the presidents of the court of common pleas shall, at stated times, *receive an adequate compensation* for their services, the same to be fixed by law. It will also be noticed that the judges of the court of common pleas under this section of the Constitution were appointed by joint ballot of both houses of the General Assembly and were to hold their offices for the term of seven years, provided, “if so long they behave well.” Judges were not then elected by the people, but were appointed by the Legislature elected by the whole body, and were essentially state officers, if a judge may be so denominated.

Section 19 of Article I, of the Constitution of 1802, reads as follows:

“The Legislature of this state shall not allow the following officers of government greater annual salaries than as follows; until the year one thousand eight hundred and eight, to-wit: the governor, not more than one thousand dollars; the judges of the supreme court, not more than one thousand dollars each; the presidents of the courts of common pleas, not more than eight hundred dollars each; the secretary of state, not more than five hundred dollars; the auditor of public accounts not

more than seven hundred and fifty dollars; the treasurer, not more than four hundred and fifty dollars; no member of the Legislature shall receive more than two dollars per day, during his attendance on the Legislature, nor more for every twenty-five miles he shall travel in going to, and returning from, the General Assembly."

It will be noticed by this section that the common pleas judges, or rather, the presidents of the courts of common pleas, are classed with and placed in the same category with the governor, judges of the supreme court, the secretary of state, the auditor of public accounts, the state treasurer and members of the Legislature; or, in other words, their salaries were to be *paid exclusively from the state treasury*.

A consideration of the various speeches of the members of the constitutional convention are very interesting and illuminating, and while it is almost impossible to give the remarks that they made, the intention was that the Legislature of the state should provide adequate compensation for its judges. One of the speakers speaks of times when the dollar might fluctuate in value, when one dollar might buy five times as much as other times, or five dollars would only buy what one dollar would at another time, and stated if at any time five dollars should not be worth any more than one dollar is now, the whole thing could be regulated by law. And the idea runs all through the constitutional debates of the convention of 1802 and 1851, leaving it to the Legislature to fix the amount as the exigencies of the occasion should require, to meet the needs and necessities of the value of money as it would appear from time to time, evidently having in mind the cheapness of the American dollar on February 4, 1920. An inspection of the constitutional debates on the section of the Constitution under consideration discloses this fact as I have stated, as mentioned by different members, that the value of money differed so that it would not be wise for the Constitution to fix the salary, but that it should be left to the Legislature which had more mobile powers and could act more rapidly in case of great financial depre-

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ciation or inflation of money, salaries could be increased when the occasion necessitated it, and it surely did not mean that they should wait until the beginning of another term, as by that time the necessity for the increase of salary might have disappeared and the dollar by that time restored to its former and normal value. One member of the constitutional convention of 1851 stated, "if left to itself, that body (the Legislature), will exercise its discretion, and it would be far better left to them to increase or diminish, *as the exigencies of the times seem to indicate.*" This language is plain and unambiguous. It does not mean that the salary of a judge should remain fixed and unchanged for seven years, as the term was fixed in the Constitution of 1802, but unquestionably means that the Legislature was to be left wholly free to increase or diminish salaries as the exigencies of the time seem to indicate.

This view was strictly according to the rule of reason. Any other is inconsistent with public interest and the common welfare. The supreme court of Pennsylvania was the only court in which this question arose in clearly analogous cases.. The case of *Commonwealth v. Mann*, 5 W. & S., 403, is squarely in point or in *pari pasu*. This case was decided in 1843.

The relator, a judge, in taking office was entitled to receive from the state an annual salary of \$1,600 and this was subsequently increased \$400, which increase was afterwards repealed by the Legislature. The relator demanded the increase, and brought an action in mandamus to enforce his demand. At the time the case was decided the Constitution provided judges should be paid "an adequate compensation, to be fixed by law, which shall not be diminished during their continuance in office." Rogers, J., who rendered the opinion did not base his action exclusively upon this phrase of the Constitution of 1838, but founded it upon those great fundamental principles upon which the whole or entire structure of constitutional government is founded. Among other things the learned judge said:

"If by the remarks already made I have succeeded in establishing the position that a complete independence of the judi-

ciary is a fundamental principle of the Constitution, designed mainly for the protection of public and private rights, and that the construction put upon that clause of the Constitution aims a fatal blow at it, then may I not here safely rest the argument? For no course of reasoning can render the proposition plainer, that the contention of the respondent is at war with the Constitution."

In this case the court held that the complete independence of the judiciary is necessarily a fundamental principle of the Constitution and that this fundamental principle was designed mainly for the protection of the public and private rights and that any other construction would be a fatal blow at this fundamental principle.

The old maxim, "Reason is the soul of the law, for when reason ceases, the law itself ceases" (1 Blak. Com., 70), should be always borne in mind in judicial interpretation.

In *Wheeler v. Philadelphia*, 77 Pa., 388, Paxson, J., said:

"We will not presume that the framers of that instrument (the Constitution), or the people who ratified it, intended that the machinery of their state government should be so bolted and riveted down by fundamental law, as to be unable to move and perform its necessary functions."

The reason why the members of the convention who framed the Constitution of 1851 (Ohio) intended that judges should receive an adequate compensation, is well expressed by the court in *Com. v. Mathues*, 210 Pa., 401:

"The judiciary are peculiar unto themselves, an independent and high class of officials, elected for exceeding long terms, giving their entire time to the public service and distinguished from other officials in the fact that upon taking office they are deprived by law and custom from deriving income from prior and usual sources, being confined to their salaries alone for subsistence with the always present public necessity of keeping up and supporting their absolute independence and dignity, and this, not so much for the benefit of the judge, as for the good of society as a whole."

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A common pleas judge in Ohio can not practice law or derive an income "from prior and usual sources," i. e., from the practice of his profession.

Section 14, Article IV, expressly provides that these judges "shall receive no fees or perquisites, nor hold any other office of profit or trust under the authority of this state or the United States," and the statutes prevent them from the practice of their profession. (Section 170, G. C.)

Possibly a common pleas judge may derive income by entering the fields of trade and commerce, but by so doing, his absolute independence as a judge would be destroyed, as he would be subject to the indirect influence and pressure of his patrons in such fields as he may enter to seek trade and business.

The case of *Com. v. Mathues*, 210 Pa., 372, above cited, is the ablest, the most thorough and exhaustive exposition of the questions involved that has come under our observation. This case arose out of an act of the Legislature of Pennsylvania, of April 14, 1903, increasing the salaries of judges. The Constitution of Pennsylvania of 1873 relating to the judiciary and salary of judges, differs from the Constitution of 1790 and 1838 in the substitution of the words, "which shall be fixed by law," for the words "to be fixed by law," and secondly, in striking out the words "which shall not be diminished during their continuance in office." The court, in speaking of these changes say (p. 394):

"We do not see that there is any real difference in the change of the words above noted, and we will show hereafter that the striking out of the second phrase above quoted works no difference in the law. The other change made is not relevant to the consideration of the question before us."

What the court had in mind was, that the striking out of the words "which shall not be diminished during their continuance in office," "worked no difference in the law," for the reason that the Constitution provided for an adequate compensation.

Section 18, Article V, of the Pennsylvania Constitution is in the following words:

“The judges of the supreme court and the judges of the several courts of common pleas and all other judges required to be learned in the law shall, at stated times, receive for their services an adequate compensation, which shall be fixed by law and paid by the state. They shall receive no other compensation, fees or perquisites of office for their services from any source nor hold any other office of profit under the United States, this state or any other state.”

With the exception of the words “an adequate compensation,” the section does not differ materially from Section 14 of Article IV of the Ohio Constitution. It will be noticed that the salaries shall be *fixed* by law; that is, fixed or permanently established and restrained from change during the term for which the judge is elected. The following parts of the syllabus are quoted:

“The act of April 14, 1903, Pa. L., 175, entitled ‘An act to fix the salaries of the judges of the supreme court, judges of the superior court, judges of the court of common pleas, and the judges of the orphan’s court, applies to all judges in commission at the time of the approval of the act, and not merely to those thereafter to be commissioned.

“An act of assembly relating to the salaries of judges will not be construed so as to give judges upon the same bench, engaged in the performance of exactly the same judicial functions, different compensation, those senior in commission receiving smaller and those junior, larger compensations unless such construction is the unavoidable result of the clear and plain mandate of the Constitution.

“Article V, Section 18, of the Constitution of 1874, which provides that judges ‘shall at stated times receive for their services an adequate compensation, which shall be fixed by law and paid by the state,’ unequivocally expresses the mandate for the adequate compensation of the judges, and negatives any restriction in regard to any increase thereof. It gives beyond question or doubt the power, in case of inadequacy to increase judicial compensation to adequate amounts, during incumbency.”

“The provisions of Article III, Section 13, of the Constitution, that ‘no law shall extend the term of any public officer, or increase his salary or emoluments after his election or appoint-

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ment,' has no application to the judiciary, and can not be read into the judiciary article, which refers to a separate and coordinate branch of the government.

"Judges are not public officers within the generic words used in Section 13, Article III of the Constitution.

"The word 'adequate' as used in the judiciary article means 'fully equal to the requirement or occasion, commensurate.' It does not mean 'average' or 'graduation.' "

The entire reasoning upon which these conclusions are founded is based upon the words "an adequate compensation." If the members of the Ohio convention of 1851 struck out these words as they appeared in the provisions of the Constitution of 1802 for the sole reason that they were manifestly superfluous and unnecessary as fundamental law the Legislature, by clear intendment being charged, in the interest of the public welfare, with the duty of providing an adequate compensation for judges, then, obviously, Section 14, Article IV, impliedly provides for such compensation and if, at any time, the compensation so provided proves inadequate, not fully equal to a judge's proper requirements or commensurate with the necessities of his position and absolute independence as a judicial officer, it is the province and duty of the Legislature to provide such adequate compensation.

That our contention is fundamentally sound, is indicated by the fact that the provision of Section 14, Article IV, that judges' compensation shall not be diminished during their term of office, has proven wholly ineffectual to prevent a condition the Constitution was designed to obviate. Neither statutes nor constitutions can hinder or prevent the operation of the immutable laws governing values, money, production or competition. There are many things influencing the conditions that determine the value of money which need not be discussed at this time. It is sufficient for our present purpose to say that the value of money is its purchasing power, or the commodities or essential things that can be exchanged for it. Measured by this standard, it will be admitted by all that the value of a dollar

today, compared with the value of a dollar in 1913, has decreased at least sixty per cent.

The functions of modern civilized government are three-fold, legislative, judicial and administrative. To attain a high state of social organization, the complete co-operation of the three functions is absolutely essential. To secure the blessings of freedom and promote the common welfare, it must be presumed that the General Assembly, in enacting laws, is acting within the powers conferred by the Constitution.

In *Palmer & Crawford v. Tingle*, 55 O. S., 440, Judge Burkett says:

“As the Constitution must be regarded as consistent with itself throughout, it must be presumed that the laws to be passed by the General Assembly under the powers conferred by that instrument are to be such as will secure the blessings of freedom and promote our common welfare.”

It is the duty of the judiciary to give such a construction to the Constitution as will make it consistent with itself, and as will harmonize and give effect to all of its various provisions. In *Senior v. Ratterman*, 44 O. S., 661, Judge Spear says on page 678:

“A law is uniform in its operation when every person who is brought within the relations and circumstances provided for is *alike affected by the law.*”

In this case the Supreme Court took into consideration the constitutional debates and the petitions which had been submitted to the constitutional convention by the people. It will be seen that the Legislature, in its efforts to promote the common welfare, inexorably driven by public necessity, and in response to public opinion has been forced time and time again to ignore the rule of uniformity in matters affecting the judiciary in the creating of various courts in the cities—superior courts and municipal courts—and fixing their salaries to be paid; the length of their term of office, and the fact that their

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salary was to be paid from the county or by the city council of the particular city or county affected. Some of these statutes passed the Supreme Court on questions of their constitutionality. It is very interesting to read the history of these different acts of the Legislature in which the rule of uniformity has been absolutely ignored, as well as the fact that laws must be of uniform application throughout the state.

According to the Pennsylvania Constitution, Section 13 of Article III, provides: "No law shall extend the term of any public officer or increase or diminish his salary or emoluments after his election or appointment."

In the case of *Commissioners v. Mathues*, 210 Pa., 372 already quoted, the Supreme Court of Pennsylvania says that this provision of their Constitution has no application to the judiciary and can not be read into the judiciary article which refers to a separate and co-ordinate branch of the government. Judges are not public officers within the generic term used in that section. And the same may be said here, that judges are not officers within the generic terms used in Section 20, Article II, of the Ohio Constitution. The laws affecting the judiciary stand by themselves and seem to have a different basis than that of any other officer. Generally speaking, judges are public officers but not such public officers as are intended to be governed by that section of the Constitution. It must be borne in mind that, at the time of the adoption of the Constitution of 1851, the compensation of judges was paid by the state, and such compensation has been paid by the state, and is still paid by the state, ever since 1802, except in certain counties where it has been found that the volume of business is so great that members of the bar could not be induced to accept positions on the bench at the compensation provided by the state.

It seems to me in considering this section of the Constitution in which it says that the salary shall not be increased or diminished, refers, if it refers at all to the judiciary, to the salary paid by the state. That was the only thing in the minds of the framers of the Constitution at the time it was made in

1802 and 1851 as no judge received any compensation from any other source than at the state treasury. Necessity had forced an additional compensation to judges. Those sitting in large cities where business is so much greater than in agricultural or rural counties, must surely be paid more money or the bench would degenerate and the members holding that great and honored position of judge would be the least equipped and the least qualified for that great position.

As I stated a while back, there have been a great many statutes passed creating additional courts in cities throughout the state, providing for compensation to be paid by either the city council or county commissioners. Most of these statutes contain the provision that the salary of these courts shall not be increased or diminished during the judge's term of office. In some instances these statutes do not contain this provision. The act of the General Assembly of February 4, 1920, now under consideration contains no such provision and by clear intentment the Legislature meant that the additional salary provided for should be available to all judges in office when the act was passed.

It may be laid down as a general proposition and it will not be controverted or denied, that when the Legislature or Constitution created an office and prescribed the duties of a person that is to fill that office and the performance of these duties require all the time of such person, and such person is not permitted to practice his profession or business in which he was engaged at the time of his election, the law implies, necessarily so, that an adequate compensation is to be paid for such services even though the Constitution or the statute is wholly silent upon the question of compensation.

In 1850 the population of the state of Ohio was less than two millions, and in 1920 two counties in the state will have practically, or very nearly that population. Industrial conditions have changed marvelously and industries have become diversified and multiplied enormously. The state is no longer strictly speaking, an agricultural state. A large portion of its

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population is urban, and follows industrial pursuits. In 1850 no man dreamed, or could possibly conceive, that cities of the size of Cleveland would spring into existence. No man then had any conception of the advance in science and in art, invention, and intellectual development that was about to take place. The elevator and sewing machine were then unknown. The transmission of the human voice by other means than speaking face to face were not even dreamed of. A few fiction writers spoke about riding under the sea, and some poet wrote about a flying machine. The world has advanced more in the development of science and art and inventions and in all those things which have annihilated time and space and distance within the last 50 years, than in all the world's history put together. New York City is the largest aggregation of people in the world and about 400 years old. Times have changed, circumstances have changed. Members of our constitutional conventions as they then existed in the past were dealing with conditions as then existed and were trying to meet the needs of supply and demand of the people with laws as they conceived them to be at that time.

I think the plain intendment and meaning of Section 14 of Article IV of the Constitution that the compensation of the supreme court and common pleas judges shall not be diminished or increased during their term of office meant that the compensation paid by the state shall not be increased during the term of office of these judges. The tendency of our times is to return to the people more of their power, more home rule, more right to determine conditions under which their people wish to live, consistent with the good of the whole. If the people of a community desire to pay their judges more for more work nobody should say them nay. It is not conceivable that the framers of our Constitution ever had in view, desire or intention to deprive a community from paying to its public servants in its judiciary branch of the government such salary as would compensate them for their services. Neither could it be contemplated that the framers of the Constitution intended to

pay one judge \$6,000 for five years, while a judge elected a few months after him should receive \$8,000 for nearly the same period of time, performing the same labor and amount of labor.

In an endeavor and desire to enforce the law it has been enunciated by our Supreme Court time and again that all laws of a general nature shall have uniform operation throughout the state. It is an impossibility in the judiciary. It never has obtained and never can. The judiciary of the state of Ohio is underpaid now and always has been. The state of New York pays its judges as high as \$17,500 annually. Pennsylvania from \$10,000 to \$15,000 and many other states are equally as considerate of the public welfare. The state of Ohio is one of the least in its pay. There is no reason for this, as Ohio has produced some of the most distinguished lawyers that any state in the Union has produced, and our opinions of the Supreme Court rank high in the councils of the other states. There is no question but that compensation is largely the controlling factor in determining the character and efficiency of the public officers. A cheap instrumentality, whether animate or inanimate, eventually proves costly and expensive. President McKinley once said, "cheap means shoddy." If the legislative policy were to reduce the salary of its officers, how long would it be until the judiciary was known as a bunch of shoddy lawyers.

To sum up, therefore, I hold as follows:

1. That Section 14, Article IV, impliedly provides that judges shall be paid an adequate compensation.
2. That Section 6 of Article IV of the Constitution is so repugnant to Section 14 of the same article, that the two sections can not be reconciled, so as to stand together, unless this construction prevails, or, that Section 6 which was adopted over sixty years after Section 14, by implication repeals Section 14, or renders its provisions nugatory and unenforceable.
3. The framers of the Constitution of 1851 in formulating Section 14, Article IV, meant and intended its provision as to compensation to refer and apply only to the compensation

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paid by the state, and therefore the inhibition against increase or decrease of compensation if given its full force or given a strictly literal construction, does not apply to additional salary provided by counties or municipalities.

4. The act of Feb. 4, 1920, containing no restrictions or limitations as to judges filling unexpired terms, the additional salary therein provided for is available and should be paid all judges now serving and performing duties as such, from the time the act becomes effective, May 24, 1920.

In conformity with the foregoing opinion in which I have endeavored to express my understanding of the law, etc., I hold that the plaintiffs have a right to a writ of mandamus in this case. Said demurrer is overruled and defendant not desiring to plead further, the order of the court is that a writ of mandamus issue against the defendant in accordance with the prayer of the petition of said relators.

**RIGHTS OF ABUTTING OWNERS AND GRANTORS ON A
VACATED STREET.**

Common Pleas Court of Stark County.

MOUNT UNION COLLEGE v. ELIZABETH and THEODORE MISTELSKI.*

Decided, 1917.

*Streets—Grantor Bound by the Line of a Street he has Described—
Easement in Vacated Street Remains in Grantee—Division of Land
in Vacated Street where the Contributions were Unequal.*

1. Where a grantor bounds a lot conveyed on a described street, and is the owner of the land embraced therein, he is estopped to deny the right of the grantee to use the land for street purposes, whether it be in fact a street or not.
2. Even if such description does not convey the fee to the center of the vacated portion of the street, nevertheless the grantee has the right to an easement in the vacated street of which he can not be deprived, and which consists in the right to have the vacated portion of the street left open and unobstructed for right of ingress and egress to his property.
3. Upon vacation, the abutting owners are entitled to reclaim the soil of a vacated street to the center thereof, unless the grant was originally taken in unequal proportions, in which latter case the owners may reclaim in proportion to the original contribution.

*Hart & Koehler, and David Fording, Attorneys for Plaintiff.
Webber & Turner, Attorneys for Defendants.*

DAY, J.

This action relates to the property rights of the respective parties in a piece of land 30 feet wide and 120 feet long, out of what, prior to vacation, was Miller avenue in the Mount Union College Addition to the city of Alliance.

*Affirmed by the Court of Appeals (Judges Shields, Powell and Houck) in a memorandum reading:

"The judgment of the Court of Common Pleas herein is affirmed for the reasons given and the authorities cited in support thereof in the well considered opinion of said Court of Common Pleas."

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The plaintiff's claim is based upon its rights under a land contract and deed from defendants. The defendants' claim rests upon their rights as abutting owners when Miller avenue was vacated, which rights they claim to still own and never to have aliened.

The plaintiff, claiming to own said piece, seeks to enjoin defendants from excavating and erecting structures on said premises, and asks to have its title quieted therein.

The defendants deny the right of plaintiff in said land, averring that they are in possession of the premises, and ask to have *their* title quieted.

The facts undisputed are:

1. That William Nixon owned about 175 acres in Sec. 35, Twp. 19, Rg. 6, Stark County, Ohio, adjacent to Mount Union College grounds.

2. Mount Union College owned for many years the tract known as Mount Union Campus, originally acquiring title from William Nixon, to the tract north thereof, including the property in controversy about 1875.

3. On May 18, 1869, William Nixon conveyed a piece 60 x 120 lying in about the center of his land, lying just northeast of the college tract, to E. J. Leeper, the 60 x 120 lot afterwards owned by the defendants. Vol. 128, P. 417 Stark Co. Records.

4. In 1889, Mt. Union College campus was laid out (Plat Book 3, page 104) at which time the Leeper tract seems to have been designated on the plat as "Out-Lot 236", Stark Co. Atlas, 1896, p. 96. (Leeper tract.)

5. In 1902, Edith and W. J. Leeper sold to Theodore Mistelski.

6. In 1907, Theodore and Elizabeth Mistelski mortgaged to Walter Miller, which mortgage was, in 1912, assigned to Viola Miller. (Vol. 448, p. 449, Mortgage Records, Stark Co.)

7. In 1909, Theodore Mistelski conveyed the premises to his wife, Elizabeth Mistelski. (Vol. 501, p. 139.)

8. In 1910, the city of Alliance vacated Miller avenue from College street to Simpson street.

9. In 1912, land contract was executed between the parties for the sale and conveyance of the 120 x 60 feet along Miller

avenue. The description of the property in the land contract is as follows:

“Situated in the city of Alliance, county of Stark and state of Ohio, and known as Lot sixty (60) feet front on College street and extending north along Miller avenue one hundred and twenty (120) feet, and further described as follows: Beginning at the corner of Miller avenue and College street; then extending north along the east side of Miller street one hundred and twenty feet (120) feet; thence east and parallel with College street sixty (60) feet; thence south and parallel with Miller street one hundred and twenty (120) feet to College street; thence west along the north side of College street sixty (60) feet to the place of beginning, together with all the privileges and appurtenances to the same belonging.”

10. In 1913, April 12th, Elizabeth and Theodore Mistelski executed deed to Mount Union College.

11. In 1913, April 12, Letter from David Fording to Mistelski demanding sufficient deed or return of money.

12. July 30, 1915, petition for injunction in this action filed when it appeared defendants had entered upon the premises in question and were about to erect structures thereon, and cross-petition by defendants asserting ownership, and asking quieting of their title.

A solution of the problem here presented requires a determination of what species of property Elizabeth Mistelski acquired upon the vacation of Miller avenue.

The general rule with reference to the rights of abutters on vacated streets is well stated in McQuillan's Municipal Corporations, page 3008:

“The effect of the vacation is to extinguish the public easement and to relieve the municipality from any duty to keep the street or alley vacated in repair. Sometimes a street is vacated for a quasi-public purpose and the purpose is stated in the vacating ordinance. In such a case, the title may be vested in the person or company for whose benefit, in conjunction with the public benefit, the street is vacated, although he is not an abutting owner. Ordinarily, however, the street or a part thereof, is vacated solely for a strictly public purpose and in such a case

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the question presents itself—in the absence of legal regulation—whether the title to the street, on such vacation, becomes vested (1) in the municipality, or (2) in the abutting owner, or (3) in the original dedicator of the street.

Except where there is a statute to the contrary, which expressly provides in whom the title shall vest, the general rule is that upon the vacation, discontinuance or abandonment of a street or alley the absolute title to the land covered thereby reverts to the owner of the fee. If the abutting owner is the owner of the fee, the reversion is to him and he takes title to the center of the street unaffected by any interest of the public. If the fee to the street or alley remained in the original proprietor or a remote grantor, the title generally reverts to him and not to the abutting owner.

On the other hand, if the title of the fee of the street is in the municipality, the decisions are not uniform as to who obtains the fee on vacation, the matter being complicated by statutes in some jurisdictions. In some states, the fee remains in the municipality. In other states, by statute or otherwise, the fee reverts either to the original owner of the fee, or to the abutting owner. If the state is the owner of the fee, then it generally becomes the owner of the street on its vacation.

Oftentimes, this title of the abutting owner free from the rights of the public which existed before the vacation of the street, is held to be in the nature of an accretion to the adjacent real estate without reference to the ownership of the fee of the street.

Of course, if the deed to the abutting owner either expressly reserves to the grantor the title to the street, or the circumstances justify the inference of intention not to convey a fee to any part of the street, the grantor remains the owner of the street, and in its vacation the title is in him as against the abutting owner. In all such cases the intention of the grantor governs, but inasmuch as a deed is most strongly construed against the grantor it will ordinarily be presumed, in the absence of express words to the contrary, that the grantor intended to convey his entire title to the frontage in the street. However, if the street is vacated while the original proprietor and platter owns the lots, and thereafter he conveys a lot by metes and bounds, and subsequently conveys to another person what was originally the street in front of such lot, the latter grantee obtains a good title thereto.

If a plat of a street is vacated by the original proprietor before the dedication is accepted by the city and before any of the abutting lots are sold, then, of course, a proportionate part of the street does not become a part of each abutting lot.”

In Ohio, the rule gleaned from the authorities seems to be as follows: Upon vacation of a street the abutter acquires by accretion a base or limited fee, subject to the easement of egress and ingress from the abutting property in the old street. This rests on *Stevens v. Shannon*, 6 C. C., 142, which holds:

“The vacation of the streets and alleys of a duly established addition to a municipal corporation extinguishes the interest of the public therein, and the title to such streets and alleys vests in the owners of the abutting lots.”

The Supreme Court of Ohio, in *Kinnear Mfg. Co. v. Beatty*, 65 O. S. 264, held as follows:

“Where a street or alley is vacated by a city, the vacated portion reverts to the abutting lot owners, subject, however, to such rights as other property owners on the street or alley may have therein, as a necessary means of access to their property.

“A property owner on a street or alley, a portion of which other than the part on which he abuts, is vacated by the city council, has no right to enjoin the obstruction of the vacated portion by the owners to whom it reverted, where he has reasonable access to his property by other streets and alleys, although the distance he may have to travel in some directions may be greater than before the vacation. To entitle a party to any relief in such cases, the inconvenience he suffers must differ in kind from that of the general public, and not only in degree.

“The rights of the lot owners in an addition, on the plat of which the streets and alleys are indicated as dedicated to public use, are no greater than, nor different from, the rights of other lot owners upon other streets of the city.”

In *Callen v. Electric Light Company*, 66 O. S., 166, 174:

“Naturally, it would be presumed that the right of reverter would remain either in the original proprietor, or would pass to and vest in the owners of the abutting lots. That, as between these two classes, the interest is in the owner of the abutting lots, was held by this Court in *Stephens v. Taylor*, Ex'r, 51 O. S., 593, where a street had been vacated by the city and the question presented was whether the fee reverted to the heirs of the original owner who dedicated the street, or to the owners at the time of the vacation of the lands abutting.”

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And in *Traction Company v. Parrish*, after stating the rule as to roads in the country, 67 O. S., 181, 190, it is held:

“But in municipalities the fee of the streets is in the city or village, in trust, however, for street purposes, Section 2601, R. S.; S. & C. 1083; *Street Railway v. Cumminsville*, 14 O. S., 523; *City of Columbus v. Alger*, 44 O. S., 485; and *Callen v. Electric Light Co.*, 66 O. S., 166.

“The fee being in the municipality in trust for street purposes, the abutting lot owner, in addition to his easement in the street for passage and repassage in common with the general public, has a special easement in the street appendant and appurtenant to his lot for ingress and egress; and when the street becomes vacated the public thereby surrenders, or more properly speaking, legally abandons the public use thereof for travel, but the private or special use or easement adheres to the abutting lots, and becomes part and parcel of them as by accretion, so as to preserve the right of ingress and egress to the lots over the land that formerly formed the street or part thereof. The reason that a street when vacated becomes a part of the abutting lots, is not because the owner of the lot owned the fee of the street, but because it must go there by necessity, to preserve his easement of ingress and egress, which in many cases is a valuable property right, and without which the lots might be of little value. The street being vacated and abandoned, the public no longer owns it, and it must either revert to the original owner, or adhere to the abutting lots by accretion. As the original owner is presumed to have received full value for the street when he sold the lots, there is no just reason why he should not have the street, when vacated, restored to him. And as the lot owners and those in the line of title have paid an increased price by reason of the easement in the street, it is only just that when the street becomes vacated, the easement should be preserved to them by addition of the vacated street to the lots, and therefore, this doctrine of accretion in such cases has been adopted in this state, and generally elsewhere.”

In the light of the above authorities, it seems settled that the city owns its street in fee,—not in fee simple, but as a base, qualified or terminable fee. The qualification of such fee is that the city owns the land between the street lines in trust for street purposes. A qualified fee, as defined by Blackstone, is:

“The estate is a fee because by possibility it may endure forever in a man or his heirs, but as that duration depends upon

concurrence of collateral circumstances which qualify and debase the purity of the donation, it is therefore a qualified or base fee."

The city when it acquired the title to this street did not acquire a private proprietary title. *Zanesville v. Telegraph & Telephone Co.*, 64 O. S., 67, 68.

While it acquired a fee, it was a base, qualified fee, or a terminable fee; it was subject to the property rights of abutting owners,—namely, that of ingress and egress; the property rights existent in the land between street lines, and over and above the property rights or easement of abutting owners must follow the fee and belong to the municipality.

Now when the city vacates and abandons its right in the premises, whatever property or proprietary rights it had in the premises, by operation of law, by accretion, went to the abutting land owners; so that the title or proprietary right or interest which by operation of law came to Elizabeth Mistelski upon the vacation of this street, was this species of a qualified or base fee in the 30-foot strip,—a fee subject to an easement. Did this interest, whatever it may be, pass by virtue of the terms "together with all the privileges and appurtenances to the same belonging"?

"It is a general rule that upon the conveyance of property the law implies a grant of all the incidents rightfully belonging to it at the time of conveyance, and which are essential to the full and perfect enjoyment of the property."

"Land does not as a general rule, pass under conveyance as an appurtenance to land. It may so pass, however, where such appears to have been the intention of the parties, and the word 'appurtenances' may when construed in connection with the nature and subject of the thing granted be sufficient to pass title to land as an appurtenance thereto." 13 Cyc, 639, 640.

"Appurtenances" as used with reference to conveyances of realty, means and includes all rights and interests in other property necessary for the full enjoyment of the property conveyed. *Jackson v. Trullinger*, 9 Oregon, 393-398; 13 Cyc., 640; 4 Corpus Juris, 1469.

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In *R. R. v. Moffitt*, 94 Mo., 56, it was held that a conveyance of a line of railroad would pass a tract of land contiguous thereto; and in *Ogden v. Jennings*, 66 Barb., 301, the Court holds that the conveyance of certain lands for the purpose of a schoolhouse, "with appurtenances" conveyed a strip of ground necessary for the purposes of a playground; and in *Gorton v. Rice*, 152 Mo., 676, it was held that the accretions passed on the conveyance of a fractional quarter section.

It should be noted that the land contract uses the words "privileges" as well as "appurtenances;" the word "privilege" means an advantage, a special right. A passage in *Dillingham v. Roberts*, 75 Me., 469, reads as follows:

"Where the description in a deed for a parcel of land bounds the premises upon one side by 'the shore of the stream at high watermark,' and then adds the words 'including all the privileges of the shore to low watermark,' the land between high and low-watermark passed to the grantee. The word 'privileges' although not a very appropriate term to use in describing the owner's title to real estate, may be used without doing any great violence to its legitimate meaning. An estate in fee simple is, in one sense, no more than the privilege of holding land by a certain tenure. Such a holding may be described as a privilege, without doing violence to the term."

It is, therefore, in furtherance of this doctrine, noted in the above authorities, that the plaintiff claims to be the owner of this property in the 30x120-foot piece, and relies to a considerable extent, on *Keer v. Commissioners of Franklin County*, 42 Ohio Law Bulletin, 193, which reads:

"Where the owner of a city lot conveys the same by deed describing the same by its platted number as the same is numbered and designated upon the recorded plat thereof, such a deed by its terms will also convey to the grantee the vendor's right, title and interest in and to the vacated part of an adjoining highway shown on such plat, in the absence of express words to the contrary."

Paine v. Consumers' Storage & Forwarding Company, 71 Fed. R., 626, held as follows:

“Where a grantor bounds a lot conveyed on a described street and is the owner of the land embraced therein, he is estopped to deny the right of the grantee to use the land for street purposes, whether it be in fact a street or not; and the same effect is given to a deed describing the lot by number and reference to an undedicated plat upon which the lot is shown to front on a street.”

As opposed to this claim, the defendants contend that having conveyed by metes and bounds along a street theretofore vacated, that thereby they only conveyed the property within the described boundaries, and no more. In support of this contention, reliance is placed chiefly on *White v. Johnson*, 110 Minn., 276; *Lough v. Michlin*, 40 O. S., 332; *Lockwood v. Wildman*, 13 Ohio, 430; *Lembeck v. Nye*, 47 O. S., 336.

In *White v. Johnson*, certain differences of fact must be noted. Allie Hewitt owned all the land and laid it out as lots 23 and 24, between which was platted LaSalle street; it was vacated while Hewitt was still the owner, and became as though no street had existed. Now, in Minnesota, it seems to be the rule that the effect of this was as though no street had ever existed. The ownership of the lots being the abutting ownership and the ownership of the fee in the street, whatever it be, was all vested in one and the same individual, before any conveyance was made. Now had any other person than Hewitt owned one of these lots prior to dedication,—the rule in Ohio, as stated in the 67 O. S., p. 264,—would be the fee subject to the easement, by accretion passed to the abutter. The rule of accretion is entirely different from the doctrine of *White v. Johnson*, and there is nothing in the case further to show that the words “privileges and appurtenances thereunto belonging” were considered or urged as having any bearing upon the question of what property right passed by the conveyance in question. The bare and naked question of what became of the fee upon vacation was considered, and there is no recognition of the easement of the abutter still existing regardless of who may own the fee, such as is the rule in Ohio.

In “*Elliott on Roads and Streets*” the author, while recognizing the doctrine contended in *White v. Johnson*, in Section 1192, recites as follows:

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“In the chapter on highways as boundaries and incumbrances, the reasons are given for the general rule that abutters are presumed to own to the center of the highway, and it is stated that it is very unusual and almost unprecedented for a landowner to sell the abutting property and at the same time retain the fee of the highway subject to the public easement; but, as intimated in the last preceding section, there is no legal objection to his doing so. These propositions are also laid down in a very recent decision by the Supreme Court of Minnesota, but a distinction is drawn as to the presumption where the highway has been vacated before the conveyance of the land. The court holds that where a street has been legally vacated before any lot has been transferred, the reasons for imputing or presuming an intention to transfer the title clear to the center of the street have ceased, ‘the proprietor holding the land free from the easement as land when he parts with lots abutting it,’ and that title to a tract of land accurately described by metes and bounds on the plat passes, but does not include a distinct parcel. As the case seems to be correctly decided and the opinion contains an elaborate review of the authorities, although there may be some statements in it that admit of some doubt, we quote from it freely below.”

Adverting to cases relied upon by defendants, *Lembeck v. Nye*, *Lough v. Michlin*, *Lockwood v. Wildman*, are not so like in point of fact and circumstance to the case at bar as to require the adoption of the principle of a hard-and-fast rule that nothing except that which lies between the boundary lines named in a deed wherein the language ‘along’ a highway or street is used, shall pass to the grantee.

Elliott on Roads and Streets, in Section 916, uses this language:

“Some courts have carried the presumption that the grantor intended to convey his interest in the highway so far as to hold that where the descriptive words are ‘by the side of,’ ‘by the margin of,’ ‘along the south line of,’ or the like, the grantee will take to the center of the road or street. It is generally held, however, in such cases, that the highway is excluded, as these words show such an intention. Certainly the way should be excluded if, in addition to such words, metes and bounds are set forth, showing that such must have been the intention.”

This section should be taken however, in connection with Section 914:

“It is said by the Supreme Court of Connecticut, that ‘There is no instance where the fee of a highway, as distinct from the adjoining land, was ever retained by the vendor. It can not be presumed that a grantor would part with his interest in the adjoining land and yet retain the fee of the highway subject to the public easement.’ The first statement of the court in the case referred to may not be strictly accurate, but it is undoubtedly true that it is very unusual to attempt to reserve the fee of a highway as distinct from the adjoining land. The general rule is, therefore, well settled that a grant of land bounded upon a highway or river, carries the fee in the highway or river to the center of it, provided the grantor at the time owned to the center, and there be no words or specific description to show a contrary intent. Thus a deed conveying land described therein as bounded ‘by,’ ‘on,’ ‘upon,’ or ‘along’ a highway *prima facie* carries the fee to the center of the highway.”

Therefrom, I think, it may be deduced that it is very unusual and almost unprecedented for a land owner to sell the abutting property, and at the same time retain the fee of the highway, subject to the easement, and that only in a case where there is an affirmative showing that such was the intention of the parties from the instruments and all the circumstances of the case should such a drastic and exceptional situation be recognized. I, therefore, feel that in the light of *Keer v. Commissioners, supra.*; *Atchinson & Topeka R. R. Co. v. Patch*, 28 Kansas, 470; *Paine v. Storage Co., supra.*; *Holloway v. Southmayd*, 139 N. Y., 390; Elliott on Roads and Streets, Sec. 1190,—that the latter authorities recognize the more just rule.

Applying these principles under which those cases, upon these points, are decided, on both sides of the question, the conclusion that I have reached is—that under the Ohio law, a property right which by accretion passed to the owner of the abutting lot, in the absence of any express provision or intention to the contrary, at the time of executing the land contract, must pass to and become the property of the plaintiff under said land contract, as a part of the privileges and appurtenances thereunto belonging. The circumstances surrounding the parties, the very position and situation of the land or lot, the street, all disclose that the facts surrounding these parties at the time were such as to require

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that whatever property rights were incidental to and were acquired by the owner of the abutting property, must pass to the grantee and purchaser of the lot known as the Leeper property. Resort need not be had to the declarations of parties at the time and prior to the execution of the land contract; it must be apparent that the owner of the entire tract all about and surrounding the Mistelski lot,—the purchaser in whose interest Miller Avenue was vacated and who had originally donated the land for said street,—it must be apparent, I say, that such a purchaser would have no other intention than to acquire *all* the property rights of the owner of the 120x60 foot lot, lying, as it did, in the center of its large tract, and adjacent to the vacated street, and the record not disclosing that the seller paid taxes on it or exercised any other affirmative act of ownership over the tract in question, nor do the instruments themselves evidence any other intent than that the grantors intended to pass all property rights in the land and the privileges and appurtenances thereunto belonging, at the time of executing said land contract, and the language of the conveyance must be construed most strongly against the grantor. *White v. Sayre*, 2 Ohio, 110; *Potter v. Burton*, 15 Ohio, 196; *Cincinnati v. Newell*, 7 O. S., 37.

An interesting point is raised by the fact that where the street was originally dedicated by one of the abutting owners, while the defendant does not concede that this varies the rule as to the right of an abutter, yet it was held in a well-considered Ohio case, by Judge May, of Cincinnati, that upon vacation of a public street by the city council, the whole of which street was dedicated out of the property of the predecessors of the abutting property holders on the west side, the abutting property holders on the east side whose grantors contributed no property to the original dedication are entitled to an easement only in the vacated street; the fee of such vacated street, subject to such easement, is in the abutting property holders who are the grantees of the original grantor who dedicated the street. *Oberhelman v. Allen*, 15 N. P. (N.S.), 75; 26 C.C.(N.S.), 305. *Ry. v. Shomalter*, 57 Kas., 681 is to the same effect; and cases could be added recognizing this doctrine.

Even if the fee in the street does not pass to the grantees, yet the easement having accrued to the abutting property must still adhere thereto, and the abutting lot owner upon the west side of Miller avenue has an easement in the full width of the street for passage to this property, which requires the restraining of the erection of structures therein, and compels the conclusion that Miller avenue must remain open and unobstructed, in order that the easement of these abutting property owners might be exercised.

It is not enough to say that access to the east lot—Mistelski lot—could be had over some other way or from the property of the plaintiff. The owner of the lot upon the west side of the street had an easement to reach his property from its eastern boundary from all parts of Miller avenue, and *Beatty v. Kinnear Mfg. Co.*, does not reach a situation such as that in which you find these abutting property owners, as the vacation in that case was not contiguous nor adjacent to the tract in question. Mrs Beatty was not an abutting owner in any sense of the word.

From a careful consideration of the facts as disclosed by the records surrounding the question presented, equity requires that an injunction should be issued restraining Elizabeth Mistelski and her husband from erecting structures and interfering with the easement of the plaintiff in the premises; and that whatsoever property rights were in Elizabeth Mistelski and her husband at the time of executing of this land contract, by virtue of its terms passed to the grantee, the Mount Union College, and its title to the premises in question is therefore quieted as against the defendants.

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Alter v. Alter et al.

**GIVING TO A WILL THE EFFECT EVIDENTLY INTENDED
BY THE TESTATOR.**

Common Pleas Court of Hamilton County.

FRANKLIN ALTER AND GEORGE T. ALTER V. ROBERT S.
ALTER ET AL.*

Decided, April Term, 1920.

Wills—Suiting a Testator's Purpose to Changed Conditions—Increase in the Annual Allowance Fixed for the Children—Justified by Circumstances Surrounding Them and the Estate.

The testator postponed distribution of his estate among his eight children for ten years after his death, with the provision that during the interim each child should receive the sum of \$2,500 per annum to be paid from the net income of the estate, the balance going to its augmentation. Following his death came the great World War, with the result that the purchasing value of the \$2,500 was reduced to about \$1,000, while the net profits of the estate arising from an extensive manufacturing plant largely owned by it increased enormously.

Held: That the manifest intention of the testator to provide a given measure of income for each of his children requires, under the changed conditions, a construction of his will enabling the children to enjoy his proposed bounty; and an order is therefore made directing the trustees to increase the annual allowance to a sum proportionate to that named in the will, which the court fixes at \$6,000 each per annum.

Willis M. Kemper and Rufus B. Smith, for plaintiffs.

Pogue, Hoffheimer & Pogue, for Robert S. Alter, and Lucien W. Alter.

James T. Robinson, for Blanche Alter, Elizabeth T. Alter, Rebecca W. Alter.

W. S. Little, J. S. Kohl, for The Union Savings Bank & Trust Company, Clifford B. Wright, Walter B. Hofer.

*For the opinion of the Court of Appeals, which is based on the same view as to the proper construction to be given to the will but limits the acceleration of income to the particular children who stand in need of it, see 31 O.C.A., ———.

COSGRAVE, J.

The petition herein recites that plaintiffs, Franklin Alter and George T. Alter, and the defendants Robert S. Alter, Lucien W. Alter, Blanche Alter, Elizabeth T. Alter, Rebecca W. Alter, are the children of Franklin Alter, deceased.

It alleges that on the 14th day of August, 1909, the said Franklin Alter, their father, made his last will and testament, which was duly admitted to probate by the probate court of Hamilton county, Ohio, March 16, 1916.

Under the terms of the will, after making certain specific bequests and dispositions of his property, he provided, in Item 6, as follows:

"I give, devise and bequeath all the rest, residue and remainder of my property, real, personal and mixed, including all lapsed or void legacies and devises, if any, to The Union Savings Bank and Trust Company, a corporation organized under the laws of Ohio, at Cincinnati, Ohio, and to Clifford B. Wright and to Walter B. Hofer, both of Cincinnati, Ohio, in trust nevertheless for the period of ten years from the date of my death, for the following uses and purposes: To be held, managed, controlled and invested, and from time to time as need be, re-invested by my said Trustees, or their successors in said trust; as hereinafter provided, for the period of ten years from and after my death, for the benefit and advantage of my eight children, namely, Franklin Alter, George T. Alter, Henry T. Alter, Robert S. Alter, Lucien W. Alter, Blanche Alter, Elizabeth T. Alter and Rebecca W. Alter, it being my wish that my estate shall be so managed and invested that it will produce a sure and regular income rather than hazard in what may promise great gain. From the income of my estate my said Trustees or their successors in said trust shall, after paying all the expenses incident to said trust, pay to each of my said children, the sum of Twenty-five Hundred Dollars (\$2,500) per annum for said period of ten years from my death. Should the net income of my estate be insufficient for any reason to pay each of my said children said sum of Twenty-five Hundred Dollars per annum as aforesaid, then in that event my said Trustees or their successors in said trust, shall pay to each of my said children an equal and proportionately less amount. Should the net income of my estate be more than sufficient to pay each of my said children said sum of Twenty-five Hundred Dollars per annum,

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such excess shall go in augmentation and become a part of the principal of my estate. My Trustees shall accept no order on said annual payments from any of my said children, nor shall said annual payments or any part thereof be in any way pledged or hypothecated by any of my said children. In the event of the death of any particular child of mine before or after my death, leaving issue, my Trustees shall pay annually to its issue, share and share alike but *per stirpes* the same amount or portion of the net income of my estate as its parent would have received if living, as above provided. In the event of the death of any child of mine whether before or after my death, leaving no issue or leaving issue, all dying before the period of final distribution herein, the income which would have been or which was theretofore payable to such child or such issue, shall go in augmentation and become a part of the principal of my estate."

The testator nominated and appointed the Union Savings Bank and Trust Company, Clifford B. Wright, and Walter B. Hofer, all of Cincinnati, Ohio, to be the executors and trustees of his last will and testament, and directed that no bond be required of them, but that this qualification should not apply to their successors.

The pleadings present two issues, one as to the authority of the court to determine the intention of the testator as deduced from the language of Item 6, and also the intention of the testator as deduced from the language of paragraph three of said Item 6.

The settled rule in Ohio in the construction of wills, is to take the will as it were by its four corners, and analyzing it thoroughly from those four viewpoints, to determine the intention of the testator therefrom.

The court has read with much care and benefit the many authorities submitted by the attorneys both for the plaintiffs and the defendants. It suffices to say that these authorities would justify the court in giving a more liberal and generous construction to the will than it is disposed to do at the present time, having in view present unsettled economic and financial conditions. It will content itself in reaching a conclusion reasonably deduced from the will itself as manifested from its language and its plain purport.

The eminent Judge Story, one of the most profound Jurists of our country, in referring to the construction of wills, uses this significant language:

“The struggle in all such cases is to accomplish the real objects of the testator, so far as they can be accomplished consistently with the principles of law; but in no case to exceed his intention fairly deducible from the very words of the will. In fine, where the meaning of the language of the will is plain, the court of construction does not go outside to discover what the testator intended; but where the provisions are doubtful or may admit of more than one interpretation, the court will put itself in the situation of the testator, in reference to the property and the relative claims of the testator’s family, the relations subsisting between him and them, and the circumstances which surrounded him, in order to be enlightened * * *.”

This rule laid down by Justice Story has been followed by numerous authorities, and may be accepted as settled law.

Following the reasoning of this rule, we find from the language of the will, and the evidence, that at the time of the making of his will the testator gave to his children substantially one-half of the income of his estate, for their benefit and advantage. If the value of the estate remained the same as of the time of his death, the determination of his intention would be very easy of ascertainment. He lived nearly seven years after the making of his will. His estate at the time of his death had increased many fold, and has continued to increase during the years subsequent thereto. It is to be regretted that with the changed conditions of the value of his estate he did not meet these changes by adding a codicil to his will. It is hardly conceivable that at the time he made his will giving practically one-half of the then income of his estate to his children, he intended that such half should be determined as his will as of the time of his death, much less at a period seventeen years after its date.

No court, whether it be sitting as a court of law or as a court of equity, can juggle with the terms of a will, and yet it is its duty in so far as may be deduced from the language of the will itself, and the state of mind of the testator at the time of its making, as evidenced by his language, to determine what he would do in view of the changed conditions of his estate.

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In the before mentioned Item 6, wherein he provided that the sum of \$2,500 per year should be used for the benefit and advantage of each of his children, that sum then had a purchasing value largely in excess of its present value, and there is no doubt from the language of the will itself that he intended thereby to give to his children a sum of money which at that time had a value which would be beneficial and advantageous to his children.

When he provided in 1909 that his children should each receive \$2,500 per year for their benefit and advantage he could only have had in mind the purchasing value of \$2,500 at that time, and it was at that time a fair proportion of the income he derived from his business, but which after that time vastly increased in amount. He could not, and did not foresee that changed conditions would cause that \$2,500 to shrink in its purchasing power, so that at the present time it only equals substantially the sum of \$1,000. It would be a perversion of the intention of the testator to assume that while his estate was increasing very many times in value, that the beneficiaries should each be subjected to a decreased value of income to practically \$1,000 per year when at the time he named \$2,500 he no doubt justly assumed he was providing his children with a fairly comfortable revenue, which would enable them to live respectably, if not luxuriously.

We may well inquire whether or not that which he thought would be fairly beneficial and advantageous to his children, has not proven to be a delusion under present existing conditions.

In order to carry out the intention of the testator does it not become the duty of the court to add to the sum mentioned in his will such additional amount as will carry out the plain intent of the testator. In doing this his children will receive at the present time that which he intended they should receive under the terms of his will.

This court has after serious and most mature deliberation reached the conclusion that the sum of \$6,000 a year for each of his children is only giving to them the value in money which the testator intended they should have at the time he made his

will, and this allowance is amply justified by the large increase of the income of the estate.

It is the order of this court that this increased allowance take effect from the time of filing the petition, August 16, 1919.

There remains a further question to be disposed of in this proceeding, and that is the construction to be given to paragraph 3 of Item 6, of this will. This paragraph reads as follows:

“I direct, however, that my trustees shall sell and dispose of my stock in the American Tool Works Company, of Cincinnati, Ohio, within one year after my death, unless my trustees shall unanimously agree that it would be for the best interest of my estate to hold said stock and continue my interest in said the American Tool Works Company for a period of three years after my death, then in that event I direct that said stock be sold and disposed of at the end of the last mentioned period; when said stock is so sold the proceeds derived therefrom shall be reinvested by my said trustees as part of the principal of my estate.”

It appears from the testimony that the American Tool Works Company of Cincinnati, Ohio, was a corporation organized under the laws of West Virginia; that after the death of the testator a corporation was formed under the laws of the state of Ohio, and that all the stock and assets of the West Virginia corporation were transferred to the Ohio corporation.

This branch of the case was not thoroughly presented to the consideration of this court, nor insistently pressed for a determination. The court will therefore pass this question for future determination, if presented by counsel representing both the plaintiffs and the defendants.

The court further orders that this case be retained for future consideration and determination, as circumstances and conditions may suggest and require.

The court has read and re-read the many authorities submitted to it by counsel on both sides, and desires to express its appreciation for the painstaking effort that counsel has made, both for the plaintiffs and the defendants, to enable the court to come to what it believes to be a righteous conclusion in this matter.

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Zajachuch v. Storage Battery Co.

RISK OF OCCUPATIONAL DISEASE ASSUMED BY EMPLOYEE.

Common Pleas Court of Cuyahoga County.

JOSEPH ZAJACHUCK V. THE WILLARD STORAGE BATTERY
COMPANY, A CORPORATION.

Decided, May 20, 1920.

*Occupational Disease—Employer not an Insurer Against—An Action
Not Maintainable Against Him for Injuries Suffered Thereby—Risk
Assumed by the Employee.*

The usual and ordinary peril of occupational disease is such a peril as an employee should foresee as necessarily incidental in the ordinary course of affairs to the business in which he is about to engage; and hence it is a risk which must ordinarily be regarded as assumed by him, and one for which an action does not lie against his employer when injurious consequences have resulted.

Payer, Winch, Minshall & Karch, attorneys for plaintiff.
F. C. Friend and Elmer W. Waite, contra.

CULL, J.

This is an action in which the plaintiff seeks to recover damages in the sum of \$25,000 for occupational disease alleged to have been brought on while in the employ of the defendant, which, as its name indicates, is a company engaged in the manufacture of storage batteries.

In the process of manufacturing storage batteries, the defendant uses lead, and employees, such as plaintiff, are required to work with such lead and in and about places and rooms in the manufacturing establishment, where such lead is used. The plaintiff entered the employ of the defendant in the month of January, 1916, and worked continuously for said defendant, as a laborer, until the month of June, 1917.

It is alleged by the plaintiff that he was ignorant of the nature of lead and its liklihood to cause lead poisoning or plumbism. It is claimed by the plaintiff that he was required to work in

rooms and places where the atmosphere was continually laden with poisonous lead dust and fumes; that he was required to handle barrels, packages and appliances, which gave off dust and fumes which brought on the disease.

Plaintiff alleges negligence on the part of the defendant in respect of a failure on defendant's part properly to apprise plaintiff of the dangers of lead poisoning, incident to the work of making storage batteries, and also claims that the defendant violated Sections 6330-1 of the General Code, and also certain ordinances of the city of Cleveland, relating to ventilation and noxious fumes and gases in workshops.

The defendant files a motion to strike the petition from the files. Two prior motions, directed to certain portions of the petition, have been ruled upon and, in effect, the present motion is a demurrer. By consent of parties it is treated as a demurrer.

The question presented on the motion to strike, involving, as it does, the right of plaintiff to proceed as if a cause of action were stated, is of interest and importance. I am surprised to find that the identical question does not seem heretofore to have been definitely ruled upon by this court, though Judge Foran practically decided it in the case of *Vayto v. Terminal Ry. Co.*, reported in 18 N. P. (N.S.), pp. 348, *et seq.*, in which case an attempt was made to state a cause of action for occupational disease, under the compensation act. In a former ruling in the case at bar, Judge Foran referred to the Vayto case, in a brief memorandum opinion, and sustained a motion such as I am now ruling upon, using the Vayto case as a precedent. In his memorandum opinion, the court said:

"The question involved in the motion to strike was practically decided by this branch of the court in *Vayto v. Terminal Ry. Co.*, 18 N.P.(N.S.), pp. 348 *et seq.* Occupational disease, as a basis of action, is purely statutory and, unless provided for by statute in express terms, no action lies."

Upon the original hearing of the motion now before the court, this ruling was followed, practically without study, but upon the re-hearing, because of later rulings of other courts—in one case, a contrary ruling—the court has gone into the matter at con-

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siderable length. Indeed, so far as opportunity afforded, the question has been gone into almost as if Judge Foran had not ruled as he did, though, as my opinion will prove, that ruling is amply vindicated by authority and what I believe to be good reasoning.

It is claimed by plaintiff that the recently decided case of *Leis v. Cleveland Ry. Co.*, to be reported in one of the forthcoming volumes of Ohio State reports, in which case this court and the court of appeals of this district are overruled in the matter of the application of certain ordinances, has an important bearing upon the question of giving effect, in actions of this kind, to Sec. 6330-1, General Code, and certain ordinances set forth in the petition. It is claimed that by applying the rule laid down in the *Leis* case, it can and should be held, under the statutes and ordinances referred to, that plaintiff is properly in court. But an even broader claim is made, and must be examined into, to-wit: that under the common law of Ohio, plaintiff is entitled to bring his action for occupational disease suffered by him. In support of this, plaintiff rests largely upon the authority of *Zailkowski v. American Steel & Wire Co.*, 256 Fed. Rep., 9. These cases, and others cited by plaintiff, will be taken up and discussed as the necessities require.

To begin with, it is perhaps proper to discuss briefly the subject of occupational disease in more than its strictly legal aspects, in order that we may know just how it is fast becoming a recognized subject of legislation, and more frequently than formerly finding its way into court. Down to the present, the subject seems to have occupied more attention from a social, economic and medical standpoint, than from that of the law, but with the development of modern humanitarian views, we are finding constitutional assemblies, legislatures and sometimes courts dealing with the subject.

Judge Donahue, lately of the Ohio Supreme Court, in the case of *Industrial Commission v. Roth et al*, 98 O. S., 34, defined an occupational disease as "a disease not only incident to a particular occupation, but developed in the usual and ordinary course or manner, by reason of and because of the occupation in which

the person suffering therefrom is or was engaged." In leading up to a formulation of this definition, which is intended as a legal rather than a medical definition, the learned judge shows by his reasoning that he was attempting a definition for that case, rather than generally, though the definition seems well designed for general legal use. The victim in that case was a common laborer, but had been ordered to do some painting to which he was not accustomed. The paint, being cold, would not flow, and he was ordered to heat it. This he did, in a small, unventilated room. As a result of inhaling fumes from the hot paint, Roth after two days became sick, dying sixteen days later. It was held to be not a case of occupational disease, but of accident, and his dependents were allowed compensation under the workmen's compensation act. In other words, the illness of Roth did not respond to the legal test laid down by Judge Donahue, in that it did not develop by reason of and in the ordinary course of the regular occupation of Roth, which was that of common laborer. This case is in line with earlier cases, holding that claims for occupational disease, as such, do not come within the purview of the workmen's compensation act of Ohio, as it stands at present.

Dr. Thompson, in his work, "The Occupational Diseases, their Causation, Symptoms, Treatment and Prevention," published in 1914, gives the following definition:

"The occupational diseases may be defined as maladies due to specific poisons, mechanical irritants, physical and mental strain, or faulty environment, resulting from specific conditions of labor."

They are not new diseases from the ultimate pathological standpoint, as Dr. Thompson says. For instance, the arteriosclerosis, or chronic nephritis, produced by lead poisoning, is not different from that due to alcoholism or other toxic cases. Nevertheless, as he states, in the grouping of their symptoms, in their mode of onset and progress as well as in their etiology, the diseases caused by industrial hazards may fairly be regarded as new to medical science, and hence there is justification for their independent classification and description.

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It is perhaps due largely to the fact that until comparatively recently, little was done by medical science to classify and describe occupational diseases as such, that the courts have heard little of them. Progress in the subject, in law, must necessarily await, to some extent at least, progress among the medical men. But there are phases of the subject that have a long history in medicine. For instance, Dr. Thompson, at page 197 of his work, says:

“Lead poisoning, or plumbism, is one of the oldest known occupational diseases, having been described for many centuries. Hippocrates recognized lead colic, and Raphael, Corregio and Michael Angelo afford well known historical examples of plumbism acquired through mixing their own paints.”

Dr. Thompson gives credit to Dr. Tanquerel des Planches (1839) for first accurately describing lead poisoning, though he says it was often referred to in general terms, much earlier. He gives to lead poisoning first place among occupational diseases in point of numbers of victims. Painters form the numerical majority, but those working in storage-battery making and white and red lead production present the most serious lesions. Next, from the numerical point of view, come pottery workers. The earliest work on tradesmen's diseases was by Bernardino Ramazzi of Padua, in 1713.

The occupational disease, as an important subject of legislation, was noticed in Europe earlier than in America. Dr. Thompson treats of this subject at some length, beginning at page 2 of his book. The various states of the Union, especially those wherein industry is centered, have taken up the matter, in recent years, and restrictive legislation has been adopted in many of them. Some states have made more progress than others, but on the whole, there are indications that the matter is now in a fair way to be dealt with in a manner its importance deserves.

In Ohio, the first really definite recognition in law of occupational disease was the constitutional amendment providing for workmen's compensation, adopted Sept. 3, 1912, known as Section 35, Article II. Unfortunately, the recognition accorded

by this amendment has never been developed far by legislative enactment providing for its treatment under the workmen's compensation act, and this branch of the court is not the first to deplore this fact, as a reference to the *Vayto case, supra*, will disclose. We have, however, some legislation, such as G. C., 6330-1, *et seq.*, enacted under the general police powers of the General Assembly, as well as ordinances of the sort pleaded in this case, which it is thought by some lawyers cover the subject. Whatever be the view of judges or lawyers on this contention, however, it will not be gainsaid that any legislation short of specific provision for compensation of victims of occupational disease under the workmen's compensation law, is inadequate and out of harmony with the modern trend of things.

Does an action lie at common law for an occupational disease? A discussion of the subject generally, rather than within the limitations of the facts peculiar to this case, is not profitless. It is true, in Ohio, that outside of the case of *Zajkowski v. American Steel & Wire Co., supra*, there seems to be no record of a recovery for occupational disease as such. One might be slow to accept word for word the dictum of the Michigan Supreme Court, quoted in *Ind. Com. v. Brown*, 92 O. S., 316, as laying down the law of Ohio on this subject, but the fact is that it is historically correct, in Ohio, as well as in Michigan. The dictum referred to is as follows:

"An employee had no right of action for injury or death due to occupational disease at common law, but, generally speaking, only accidents, or accidental injuries, gave a right of action. We are not able to find a single case where an employee has recovered compensation for an occupational disease at common law."

The *Brown* case was decided in 1915. The *Zajkowski* case, *supra*, was decided in 1918. Whether the Supreme Court of Ohio would have considered the *Zajkowski* case, had it been decided before the *Brown* case, I am unable to say.

With the exception of the *Zajkowski* decision, I find no case cited by plaintiff, in Ohio, and few elsewhere, which may not be held to be an accident case, rather than an occupational dis-

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ease case, if I look at them in the light of the ruling in the case of *Ind. Com. v. Roth, supra*. The broadest possible interpretation of that rule would seem to be that, where an acute illness is caused through the negligence of the employer, in the matter of warning, to an employee whose regular work is not that to which the illness is incident, there is possible liability, under the general rules of negligence. The employee may be regularly employed by the employer for other work, and directed, as was Roth, in the case above cited, to take up, for a time, a task involving a hazard of occupational disease, or, as in the case of *Fox v. Peninsular Works*, 84 Mich., 676, he may have been employed for but a short time, and given no instructions—even misinformation—about the hazards of his work. In the latter case, it is also to be observed that the court, at page 682 of its opinion, indicates that it was treating the hazards of poisoning from contact with Paris green as not obvious, hence not chargeable to the knowledge of the victim. Again, the employee may be a minor, as in the case of *McCray v. Varnish Co.*, 7 Pa. Sup. Ct., 610, working in various capacities, and assigned temporarily to the hazardous occupation. Youth, inexperience, latent dangers, deception, and other facts, have been and are seized upon by courts to take out of the operation of the general rule, particular cases, but the general rule is not changed thereby, indeed, it would seem that the exceptions prove the rule. And where courts of soundly established authority have ruled that there is an action at common law, it would seem best, in Ohio, at least, in view of the decision in the Brown case, *supra*, to treat them as departures from the recognized rule. In this manner, I feel obliged to dispose of such respectable authorities as *Zajkowski v. American Steel & Wire Co., supra*. Nor does the unreported memorandum opinion of Judge Westenhaver, upon demurrer, in cases 9405, 9428 and 9429, United States District Court, to which this court has had access, indicate a different view on the part of that court.

A ruling similar to that of the Ohio Supreme Court, in cases above cited, as indicating the common law rule, is to be found in *Wilcox v. International Harvester Co.*, 14 Negligence Com-

pensation Cases Annotated, p. 728, where it is stated that, under the law of Illinois, there is no right of action for occupational diseases, unless the workmen's compensation act of that state applies.

The theory of the common law, if there is one, in reference to occupational diseases, is that human foresight can hardly guard against them. Progress in prophylactic treatment is being made, but no such progress has yet been made, that it may be accepted as a matter of law that any safeguards are reasonably certain. In that state of affairs, it is the province of the Legislature to act, and, after investigation, to lay down rules for courts to follow. The determination of standards is not a burden that should be placed upon the courts.

There being no common law action for occupational disease victims, does Section 6330-1, G. C., furnish authority for a right of action?

Counsel for plaintiff state that the effect of holding it does not, is to hold that section unconstitutional. Of course, it is not necessary to hold the section unconstitutional, to say that it does not, as it stands, furnish a right of action to one suffering from an occupational disease. It might be inoperative in the matter in which it is invoked, and be operative otherwise.

Reasoning from what I have said as to there being no common law right of action for occupational disease, it follows that if the Legislature intended to change the law, it should have done so in express language. Since there was no common law right of action for occupational disease, the mere enactment of a general police regulation, such as Section 6330-1, did not serve to bring into existence a new right of action, such as the one involved in this case. That section is a step toward the objective every one desires, but it does not go far enough to accomplish what plaintiff contends. Certainly, if it was intended so to do, it would have been easy for the Legislature so to declare. Nor does the invocation of the rule laid down in *Variety Iron & Steel Works Co. v. Poak*, 89 O. S., 297, assist. Negligence actions, as such, are one thing, and actions for occupational disease are quite another. In the one case, the right of action

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is easily recognizable and of long standing. In the other, there is no recognition of it as such, and can be none without legislative enactment. Even if the Poak case were applicable, this court would be obliged to follow the reasoning of the Supreme Court, in *Woodenware Co. v. Schoreling*, 96 O. S., 305, in the matter of definiteness.

What has been said heretofore disposes, in the opinion of the court, of the arguments of plaintiff, based upon the ordinance. There being no recognized right of action for occupational disease, as distinguished from so-called accident, through negligence, the ordinances are inoperative, generally speaking, to give rise to such action, even if violated. In a negligence case, pure and simple, violation of one of them would be negligence, *per se*, but in an action of this nature, they are without effect.

In the view taken of the case at bar by this court, the ruling in the case of *Leis v. Cleveland Ry. Co.* does not apply. The answer to the argument of plaintiff, based upon the first proposition of the syllabus, to-wit, that "there is no property or vested right in any of the rules of the common law, as guides of conduct, and they may be added to or repealed by legislative authority," is found in the fact that the Leis case was a negligence case, and not an occupational disease case. As to the third syllabus, to the effect that every intendment is to be made in favor of the lawfulness of local regulations enacted by a municipality to promote the public health and safety, there is nothing to indicate that it was the intention of the court to read into such regulations, unless clearly expressed therein, the establishment of a new ground for civil action where there was none before.

It may be hard, at times, to ascertain whether a given case is one of occupational disease, or otherwise, and where there is obscurity, some of the decisions would seem to indicate a tendency toward treating the case as one to which the general rules of negligence cases apply, but if there is no express legislative action, giving a right to sue and the occupational disease answers affirmatively to the test laid down by Judge Donahue,

quoted above, then it would seem no right of action is recognized. This is not at variance with the general rule as to a master's duty toward his employee, as given in Shearman & Redfield, 6th Ed., Sec. 203:

"It is also the personal duty of the master, so far as he can, by the use of ordinary care, to avoid exposing his servants to extraordinary risks which they could not reasonably anticipate; although he is not bound to guard against an accident which is not at all likely to happen. The master must, therefore, give warning to his servants of all perils to which they will be exposed, of which he is or ought to be aware, other than such as they should, in the exercise of ordinary care, have foreseen as necessarily incidental to the business, in the natural and ordinary course of affairs, though more than this is not required of him."

The usual and ordinary peril of occupational disease, the overweight of opinion indicates, is such a peril as the employee "should have foreseen as necessarily incidental to the business in the natural and ordinary course of affairs"; hence it is a risk ordinarily to be assumed by him.

The motion to strike is granted.

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**VALIDITY OF IMPROVEMENT CONTRACTS IN
CHARTER CITIES.**

Common Pleas Court of Summit County.

THE CITY OF AKRON V. EARL A. ZEISLOFT ET AL.*

Decided, June 10, 1920.

Municipal Corporations—Authority for Local Improvements in Charter Cities—Not Dependent upon Statutory Law—But upon the Regularity of Municipal Legislative and Administrative Proceedings.

1. The home rule amendment to the state Constitution confers upon a charter city all the powers of local self government, and within the scope of its authority the council of such a city becomes the law-making body thereof to the same extent as is the Legislature in the enactment of laws for the state at large.
2. The validity of a contract for a local improvement, undertaken by a charter city, is not dependent upon statutory law relating to municipalities, but upon the provisions of its charter and the acts of its council thereunder; and the validity of a contract for a local improvement is not open to attack where the charter provisions regarding the making of such contracts have been substantially complied with.
3. In the absence of a claim of fraud or lack of good faith on the part of the service director of a charter city, his discretion is determining who is the lowest and best bidder and in awarding the contract in accordance with such determination will not be interfered with by the courts.
4. A taxpayer is not a necessary or proper party to an injunction suit to test the validity of municipal contracts where the solicitor or director of law upon demand, under the provisions of Section 4314 of the General Code, brings such action, but the court in its discretion, may appoint such taxpayer's attorneys *amici curiae* for the trial, and permit them to participate in the proceedings.

Henry M. Hagelbarger, Director of Law, and *Frank H. Harvey*, Assistant Director of Law, for plaintiff.

*Affirmed by the Court of Appeals for the Eighth District on July 1, 1920.

Jonathan Taylor and *J. F. Cronan*, of Boston, Mass., for defendants.

C. F. Berry and *C. T. Grant*, *amici curiae*, appointed by the court.

TREASH, J.

On May 27, 1920, the city of Akron filed its petition herein to restrain the defendant, the Peter W. Connolly Company from performing its alleged contract with the city of Akron for the laying of 4.1 miles of pipe line from the storage reservoir of the city in the Cuyahoga valley to Akron, and to restrain the director of public service and the director of finance of the city from making payments upon this contract. Separate answers were filed by the Peter F. Connolly Company and the director of public service and the director of finance of the city of Akron. The facts of the case as developed at the hearing were substantially as follows:

On May 22, 1920, Andrew J. Wilhelm, a taxpayer of said city, requested in writing the director of law of the city to bring this injunction proceeding, and in accordance with that demand the director of law began the action on behalf of the city. Mr. Wilhelm was not satisfied with the proceedings of the director of law, and through his attorneys appeared and asked leave to intervene and file an answer and cross-petition, to which all the parties to the cause objected. It was urged that this action involved not only the validity of the contract in question, but also in principle many other contracts of the city since the enactment of the new charter, and that the taxpayers generally were vitally concerned in many of the questions to be presented for determination in this action, and that Mr. Wilhelm was a proper and necessary party to the proceeding.

It has been repeatedly held that this form of action under Section 4314, General Code, is solely one for and on behalf of the municipality for the purpose of testing the validity of the acts of its agents and officers, and to protect the interests of the municipal corporation for the benefit of the general pub-

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lic and not for any individual or group thereof, and only when the city solicitor or the director of law neglects or refuses to begin the action may it be maintained on behalf of the city by a taxpayer. The taxpayer is, accordingly, not a necessary, or even a proper party to such an action and the application to make Mr. Wilhelm a party was refused. *Hensley v. Hamilton*, 3 O. C. C., 201; 2 O. C. D., 114; *Knorr, ex rel, v. Miller et al*, 5 O. C. C., 609; 3 O. C. D., 297, affirmed by the Supreme Court; *State v. Bowers*, 4 O. C. D. (N. S.), 345; 16 O. C. D., 326, affirmed 70 Ohio St., 423.

However, it appearing to the court that counsel for Mr. Wilhelm had made careful preparation of the questions to be presented, and that one of his counsel was a former city solicitor and the other a former assistant prosecuting attorney, both able lawyers, the court invited them and upon their acceptance appointed them to act as *amici curiae* to sit in the trial of the case and present such arguments and briefs as they might desire.

By an ordinance of the city council passed May 13, 1918, a special election was called for the purpose of securing the approval of a \$2,000,000 bond issue for the purpose of enlarging and improving the water works of the city of Akron, and at a subsequent election held August 13, 1918, this bond issue was approved by a vote of the people.

Pursuant to an advertisement by the director of public service, bids were received and opened on the 9th day of January, 1920, for constructing a 48-inch force main either of cast iron or steel pipe for a line about 4.1 miles in length. Defendant Peter F. Connolly Company furnished alternative bids as follows: first, for furnishing and laying 48-inch lock bar pipe \$681,360; and, second, for furnishing and laying a 50-inch riveted steel pipe \$611, 660. Another bid by the T. R. McShaffrey Company was, "for furnishing and laying 48-inch lock bar steel pipe for \$748,000." The city desired to use the lock bar steel pipe, and at the time of the opening of the bids a controversy arose as to the price of this pipe, which had been separately listed in the bids. It developed that the Connolly

Company had only estimated the price upon this pipe, being unable to secure a definite quotation from the sole owners and manufacturers, but a few days thereafter did receive a lower quotation than had been estimated in the bid and immediately submitted to the service director a proposal to furnish the lock bar pipe at the same figure specified for the riveted steel pipe, namely \$611,660. At about the same time the T. E. Mc-Shaffrey Company offered to furnish the same pipe at a figure about \$34 less, although their first bid was the higher, being \$747,627.50. The service director finally awarded the contract to the lowest bidder under the original proposal, but at the reduced figure of \$611.660. On January 19, 1920, the director of public service accepted the Connolly Company's offer, and on January 27th, entered into a contract with said company on behalf of the city for making the improvement and furnishing the pipe. On January 13, 1920, an ordinance was passed by the council to issue bonds in the sum of \$685,000, for the purpose of extending, enlarging, improving, repairing, and securing a more complete enjoyment of the water works of the city of Akron, Ohio, for the purpose of supplying water to said city and the inhabitants thereof, known as ordinance No. 6529. The third section of the ordinance provides as follows:

"Said bonds shall be sold by the mayor and auditor or director of finance of said city and the proceeds from the sale thereof, except the premiums and accrued interest, shall be placed in the treasury to the credit of the fund for the improvement aforesaid, and shall be used for said purpose and none other; and that the premiums and accrued interest received from the sale of said bonds shall be transferred to the trustees of the sinking fund."

At the time of the execution of the contract with the Connolly Company, the director of public service was not given specific authority by any ordinance or resolution of council to enter into said contract, nor was there any certificate filed by the director of finance of the city showing the money in the treasury unappropriated for any other purpose, and applicable to this improvement, as required by Section 3806 of the General Code of

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Ohio. On February 24, 1920, the city council passed a resolution known as ordinance No. 6559, determining that the action of the director of public service in letting certain contracts was proper, and approving said contracts:

“Section 1. That whereas, the director of public service, having let contracts after competitive bidding, for the following public improvements, to-wit * * *:

“(b) Construction of a forty-eight inch force main for the water works department, 4.1 miles from the Kent Pumping station south * * *.

“Now, therefore, it is determined by the council that said action of the director of public service was proper and was for the best interests of the city of Akron, and therefore, each of said contracts is hereby approved.”

Advertisement for the sale of the bonds was made, but no bids were secured, and on March 9, 1920, an ordinance was passed by the council repealing ordinance No. 6529 referred to, and substituting another ordinance in the same terms and conditions with the exception that the interest rate on the bonds was raised from five to five and one-half per cent. These bonds were subsequently sold, and the money is now in the treasury sufficient to pay for the proposed improvement.

On the 25th day of February, 1920, J. M. Poulson, a taxpayer of the city of Akron, began an injunction suit against the city to restrain the city from proceeding with said contract with the Connolly Company. A demurrer was filed by the city to this petition, but before the demurrer was passed upon the plaintiff dismissed his petition. The Connolly Company, in their answer pleaded, and also showed at the hearing, that they had proceeded with the execution of their contract, had let sub-contracts aggregating more than \$300,000, and had expended large sums of money in preparation for the execution of their contract, having organized and assembled equipment and labor for such purpose, relying upon the good faith of the city in carrying out the contract, and the dismissal of the said injunction suit. On November 5, 1918, the city of Akron adopted a charter under the provisions of the home rule amendment to the Constitution, which became effective January 1, 1920.

The first question presented for determination is, was the making of this contract controlled by the statutory law relating to municipalities, or was it controlled by the charter of the city, and the acts of its council thereunder. If the charter controls then we will not need to enter into a consideration of the various defenses by way of estoppel and otherwise which are claimed by the defendants as validating this contract, unless it shall appear that the procedure is not in accord with the charter and the ordinances of the city council, or unless the state laws are made to apply by the terms of the charter itself.

We will, therefore, first consider the claim that under the Constitution of Ohio no power is vested in a municipality to make such laws different and at variance with the acts of the Legislature governing the contracting of debts, borrowing of money, levying of taxes and making of assessments. It is urged that these powers are reserved specifically to the Legislature and can be only exercised by the Legislature, and that Article 13, Section 6, of the Constitution providing as follows:

“The General Assembly shall provide for the organization of cities and incorporated villages by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power.”

And Article 18, Section 13:

“Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes,” etc.,

are limitations upon the “home rule” powers of municipalities as contained in Article 18, Section 3:

“Municipalities shall have authority to exercise all powers of local self-government,” etc.,

and Section 7:

“Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of Section 3 of this article, exercise thereunder all powers of local self-government,”

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and it is contended that the Constitutional provisions reserving to the Legislature the power to "restrict" and "limit" the city's powers to "levy taxes," "borrowing money" and "contracting debts," reserves to the Legislature sole power to determine the manner and method of making contracts for public improvements, and this applies to charter cities as well as to other cities.

The case of *State, ex rel, v. Cooper*, 97 Ohio St., page 96, wherein the Supreme Court held that the Smith one-percent. law was a law limiting taxation, within the meaning of the Constitution, and that the city of Toledo must subject itself to its limitations and the supervision of the county budget commission, is urged as sustaining this contention. The Smith one-percent. law is clearly an act "limiting" and "restricting" taxation, but by what process of definition, construction or interpretation could the word "limit" or "restrict" be applied to the statutes providing the manner and means of making municipal improvements and contracting debts. On the contrary, these various statutes provide how debts may be contracted, money borrowed, and taxes and assessments levied. There is no attempt to "limit" or "restrict" debts and taxation in any of the acts specifying the various steps that must be taken by the council in its legislative procedure. Their only purpose is to show "how" it can be done, and to give certainty, definiteness, regularity and uniformity to the proceedings throughout the state. This procedure was a question of expediency and regulation properly within the discretion of the Legislature which derived its power and authority from the Constitution. But since the home rule amendment to the Constitution all powers of local self-government are vested in the municipalities where they choose to adopt charters claiming such powers, and when a charter has been so duly adopted, a municipality derives its power, not from the Legislative enactments, but from the Constitution, and the council of that municipality becomes a law-making body of the municipality within its scope and authority, even as the Legislature does for the state.

Johnson, J., rendering the opinion in *Billing v. Railway Company*, 92 Ohio St.. at page 482, *et seq.*, says:

“Under the Constitution, previous to the amendment in 1912, municipal corporations in their public capacity possessed such powers, and such only, as were expressly granted by statute and such as might be implied as essential to carry into effect those powers which were expressly granted. *Ravenna v. Pennsylvania Company*, 45 Ohio St., 118.”

* * * * *

“The manifest purpose of the amendment in 1912 was to alter this situation and to add to the governmental status of the municipalities. The people made a new distribution of governmental power. The charter of the city which has been adopted in conformity with the provisions of Article 18, and which does not disregard the limitations imposed in that article or other provisions of the Constitution finds its validity and its vitality in the Constitution itself and not in the enactments of the General Assembly. The source of authority and the measure of its extent is the constitution. The powers conferred by such a charter, adopted within the limitations stated, are not affected by the general statutes of the state.”

Interpreting the charter of the city of Cleveland, he further said:

“Section 7 confers on the municipality authority to adopt a charter ‘for its government’ and ‘to exercise thereunder all powers of local self-government.’ As to the phrase ‘all powers of local self-government’ it is said in the Lynch case, *supra*: ‘They are such powers of government as, in view of their nature and the field of their operation, are local and municipal in character.’ And in *Fitzgerald et al v. City of Cleveland*, 88 Ohio St., 338, 344, it is said: ‘It is sufficient to say here that the powers referred to are clearly such as involve the exercise of the functions of government, and they are local in the sense that they relate to the municipal affairs of the particular municipality.’

“Any provision in a charter attempting to confer powers upon a municipal government in excess of the powers permitted to be granted by the constitution, or disregarding in any way the limitations imposed by that instrument, would be invalid. But it does not follow from this that a city may not by its charter confer on its government powers which are different from those conferred by general laws upon the municipal governments of the state generally.

“It was contemplated by the framers of the amendment to the Constitution that the provisions in a charter, adopted by a

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city, would differ from the general laws of the state, within the limits defined by the Constitution. The object of the amendment was to permit such differences and to make them effective."

The making, installation and maintenance of water works for the supplying of its citizens with water is purely a matter of local concern, and has always been recognized, like other public improvements, as a matter of municipal concern, and it can not be presumed that the framers of the home rule amendment to the Constitution, nor the people in endorsing it, contemplated that the very vital matter of making such improvements and the manner and form of procedure in legislating for the improvement, letting the contract, and designating the officials who shall execute it and enforce it, should be left to the Legislature of the state. As is said by Johnson, J., 92 Ohio St., 486:

"It is well settled that a body adopting amendments, such as are here involved, will be presumed to have had in mind the legal status of and the course of legislation and existing statutes touching the subjects dealt with.

"A consideration of the course of legislation in Ohio under the old Constitution seems to clearly disclose that the control of streets has been regarded as a matter chiefly of municipal concern, the control to be exercised under such regulations as the Legislature prescribed. It being, as shown, the source of municipal authority."

The same reasoning as applied by the Supreme Court in regard to the control of streets and the letting of municipal franchises applies even with greater force to the making of public improvements for water works, and were the power of contracting debts, borrowing money, levying taxes and assessments to be withdrawn from the local government, home rule would be but an empty phrase and limited to a mere form of government.

The Supreme Court in the case of *Fitzgerald v. Cleveland*, 88 Ohio St., 443, has definitely determined that no such limited construction can be placed upon the home rule amendment:

"It is contended by plaintiffs in error that the office of the charter, referred to in Section 7, is merely to provide a form of

government and not to prescribe any of its functions. When considered in connection with Section 3 and the rest of the provisions of Article 18, and in the light of the manifest objects sought to be attained by their adoption, we think there is no warrant for giving this limited meaning to the language."

Again, in the case of *State, ex rel Bailey, v. George*, 92 Ohio St., 344, second paragraph of the syllabus:

"Statutes passed in pursuance of such home rule amendment should be liberally construed so as to effect the plain purpose of such amendment."

The charter of the city of Akron grants to the city ample authority for the construction and maintenance of public improvements.

"Section 1. The inhabitants of the city of Akron, * * * may create, provide for, construct, regulate and maintain all things of the nature of public works and improvements * * *."

"Section 2. The enumeration of particular powers by this charter shall not be held or deemed to be exclusive, but, in addition to the powers enumerated herein, implied thereby or appropriate to the exercise thereof, the city shall have and may exercise all other powers which, under the Constitution and laws of Ohio, it would be competent for this charter specifically to enumerate."

It must, therefore, follow that the validity of the contract in question must be determined by the law of the charter and the legislative and administrative steps taken thereunder to authorize it.

But it is claimed that the charter itself has provided no specific method for letting contracts and making public improvements, but, on the other hand, it is specifically provided that the procedure shall be that enacted by the state law.

Section 1 is as follows:

"* * * The city shall have all powers that now are, or hereafter may be granted to municipalities by the Constitution or laws of Ohio; and all powers, whether express or implied, shall be exercised and enforced in the manner prescribed by this charter, or when not prescribed herein, in such manner as shall

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be provided by ordinance or resolution of the council, and when not prescribed by this charter or amendments thereto, or ordinance of council, then said powers shall be exercised in the manner prescribed by the state law."

Section 129 is as follows:

"Public improvements of all kinds may be made by the appropriate departments either by direct employment of the necessary labor and the purchase of the necessary supplies and materials, with separate accounting as to each improvement so made, or by contract duly let after competitive bidding, as the council may determine."

Were these all of the provisions of the charter on the subject of powers and improvements, there might be some force to the argument of the *amici curiae*, but there are other sections bearing upon the subject, which, by the primary laws of construction of any instrument must be looked to to determine the intent.

Section 27 of the charter is as follows:

"There is hereby created a council which shall have full power and authority, except as otherwise herein provided, to exercise all the powers which now are or may be hereafter conferred upon municipalities by the Constitution of Ohio, and all the powers conferred upon the city of Akron by the charter, and any additional powers which have been or may be conferred upon municipalities by the General Assembly."

Section 36 is as follows:

"No money shall be drawn from the treasury of the city, nor shall any obligation for the expenditure of money be incurred except pursuant to appropriations made by the council; and whenever an appropriation is so made, the clerk shall forthwith give notice to the director of finance. Moneys appropriated as hereinbefore provided shall not be used for other purposes than those designated in the appropriation ordinances, without authority from the council."

Section 131 provides:

"All contracts entered into by the city or for its benefit prior to the taking effect of this charter shall continue in full

force and effect. All public work begun prior to the taking effect of this charter shall be continued and perfected hereunder. Public improvements for which legislative steps shall have been taken under laws in force at the time this charter takes effect may be carried to completion in accordance with the provisions of such laws."

The only legislative step claimed to have been taken prior to the going into effect of the charter was the bond resolution of May 13, 1918, providing for a special election to authorize the issue of \$2,000,000 in water works bonds. This, however, can not be considered as a "public improvement for which legislative steps shall have been taken under laws in force at the time this charter takes effect," for there are no legislative enactments in the making of this improvement required by the statute, and while these bonds may be considered as a part of the \$2,000,000 issue, still there is no legislative connection necessarily between the two, and therefore none of the legislative steps for this improvement were taken prior to January 1, 1920. Furthermore, this section is permissive and not mandatory, and does not require such public improvements to be carried to completion in accordance with the provisions of the state law.

Having determined that the city, under the Constitution and its charter, not only has "power" to determine the manner and means for making contracts for its local improvements, but that this improvement in question is one coming within the jurisdiction of the city under its charter, the question now arises, does the charter make any provision in regard to the award of contracts? We are of the opinion that it does, and that these steps have been substantially complied with.

The only legislative requirement under the charter for the making of a contract is that contained in Section 36, as follows:

"No money shall be drawn from the treasury of the city, nor shall any obligation for the expenditure of money be incurred except pursuant to the appropriations made by the council; and whenever an appropriation is so made the clerk shall forthwith give notice to the director of finance. Moneys appropriated as hereinbefore provided, shall not be used for other purposes than those designated in the appropriation ordinance, without authority from the council.

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On January 13, 1920, the council did make an appropriation for this purpose by passing ordinance No. 6529, and provided therein for the issuance and sale of bonds in the sum of \$685,000 and that the "proceeds should be placed in the treasury to the credit of the fund for the improvement aforesaid, and should be used for said purpose and no other."

In pursuance of this bond and appropriation ordinance, the contract was let on January 27, 1920.

It is true that this ordinance was subsequently repealed after the execution of the contract, and a new ordinance in the same terms and conditions passed providing a rate of five and one-half instead of five per cent. interest on the bonds. While in the form of a repeal, this ordinance was in substance and in truth an amending ordinance, and should properly have been so labeled. The court will look not to the technical form, but to the substance, in interpreting such legislation, and must give effect to the real purpose and intention to be accomplished, which was namely, the raising of the rate of interest on the bonds that they might be sold, since no bids had been received at the five per cent. rate.

On February 24, 1920, the council passed a resolution specifically referring to this contract and approving and confirming it. Prior to that time there had been no ordinance or resolution passed by council determining the method for the awarding of contracts for public improvements. No money had been drawn from the city treasury, nor had any obligation for the expenditure of money been incurred prior to the bond and appropriation ordinance of the council, and it, therefore, follows that the provisions of the charter in this regard had not been violated.

It is urged, however, that the portion of section 36 providing that "whenever an appropriation is so made, the clerk shall forthwith give notice to the director of finance," was a condition precedent to the execution of the contract. There are no terms nor language to this effect, and the provision is evidently directory only, intended to advise the director of finance of the appropriation ordinance, and of his authority to make pay-

ments thereon. It does not provide that the failure of the clerk to give such notice shall make the contract void or affect in any way its validity. At most no payment upon the contract could be enforced until such certificate had been issued to the director of finance, but that is a matter not in issue here.

It is further claimed that, granting the sufficiency of the legislation of council, that the contract was not awarded in compliance with the provisions of the charter.

Section 129 of the charter provides two ways in which public improvements may be made by the appropriate departments, either by the direct employment of the necessary labor and the purchase of the necessary material, or by contract, as the council may determine.

Section 65 of the charter provides that "the director of public service shall manage and supervise all public improvements," and "manage and control the water supply system and maintenance and operation of the same. The director of public service was, accordingly, the proper officer to make this improvement, and he chose the second method of doing it by contract and advertised for bids, which were received and opened in the manner heretofore indicated. There is no requirement as provided in Sections 3806 and 4328 of the General Code that the money must be in the treasury to the credit of the fund, etc., and that the contract shall be awarded to the lowest and best bidder, but the only provision is that the work may be done by contract duly let after competitive bidding, as the council may determine. The Connolly Company was the lowest bidder when the bids were originally opened, and subsequently voluntarily reduced their bid nearly seventy thousand dollars. After that, the other bidder made a slightly greater reduction, which, however, involved no material financial difference, and the director of public service awarded the contract to the Connolly company.

There has been no claim made of fraud or lack of good faith on the part of the service director of the city of Akron, Connolly Company, or any other parties connected with the transaction. It was properly a matter within the discretion of the

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service director, and he was bound by no law providing that the contract must be let to the lowest and best bidder. He is presumed to have taken into consideration all of the factors and elements connected with the transaction, and within his discretion, his decision can not be questioned, except for fraud.

But it is urged that the council did not determine which of the two methods should be used in making the improvement, and that, therefore, the director of public service was without authority to receive bids or let the contract. It is true that no general method of procedure had been provided by an ordinance of council, and that no method of determining which course should be followed by the service director was taken in making this improvement, except the resolution of February 24, confirming and approving the proceedings of the director of public service. It will be noted that there is no provision of the charter requiring a uniform and general method being devised by the council for awarding contracts, nor does the charter provide that any such method shall be determined in advance of receiving bids, as provided by statutory enactments, but since the council is sovereign within the power entrusted to it, and there are no limitations in the charter as to when it shall exercise its power, there is no good reason why it can not exercise its judgment and discretion by passing the necessary legislation approving and confirming the acts of the city officials, done within the scope of their authority, after as well as before these acts are performed.

It is finally urged by the *amici curiae* that the framers of the charter never intended to confer such unbridled authority upon the director of public service and the council as this, and thus open the way without let or hindrance to favoritism, extravagance and corruption. We can best judge of the motives and intent of the framers of the charter by what they actually did, and since they clearly gave such unbridled and autocratic authority to the director of public service and the council, it is not within the province of a court to correct their mistakes, if they were made. It is only the function of the court to interpret and declare the law as it is made by the people or

the legislative power. The question of the wisdom or expediency of such a procedure for letting contracts as is devised in the Akron charter, is one which is within the power of the council and the people of the city of Akron to correct at any time, if they see fit, and if fraud and corruption come, the fault must rest upon those who originated and made it possible, but it is neither necessary nor becoming to this court to pass upon that matter.

The petition of the plaintiff is, accordingly, dismissed, at its costs.

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State ex rel vs. East Cleveland.

VALIDITY OF A BUILDING ZONE ORDINANCE.

Common Pleas Court of Cuyahoga County.

STATE OF OHIO, EX REL MAX MORRIS, v. C. M. OSBORN, CITY MAN-
AGER OF THE CITY OF EAST CLEVELAND, AND M. W. GAR-
NET, BUILDING INSPECTOR OF SAID CITY.

Decided, April 30, 1920.

*Municipal Corporations—Emergency Ordinance Establishing Building
Zones Valid, When—Police Power.*

An emergency ordinance adopting a building zone plan, establishing and fixing the boundaries of building zones and regulating the location, erection, use and maintenance of all buildings therein, thereby restricting in one certain zone or locality the erection of buildings to single and double residence dwellings only, is within the valid exercise of the police power in a charter city, and such ordinance in the absence of a showing that the classifications made are unreasonable, arbitrary, discriminatory and not uniform in operation, is neither invalid nor unconstitutional.

KRAMER, J.

This case is an action in mandamus to compel the building inspector of the city of East Cleveland to issue permits to one Max Morris to erect certain apartment houses upon Stanwood and Grasmere streets in that city. The case is before this court for rehearing, it having heretofore been determined against the relator, the opinion of the court (Foran, J.), being published in the Ohio Law Bulletin of March 15, 1920, at page 98. From that opinion it would appear that the facts which appear upon rehearing are substantially the same as appeared in the case when heard previously.

The facts, in so far as they relate to the issues here made, are as follows:

The city of East Cleveland, in Cuyahoga county, has a commission form of government, operating under a charter, duly adopted, providing for local self-government, according to the Constitution of Ohio.

On July 15, 1919, the city commission of the city of East Cleveland passed ordinance No. 1220, entitled, "An emergency ordinance, adopting a building zone plan for the city of East Cleveland, establishing and fixing the boundary of building zones, and regulating the location, erection, use and maintenance of all buildings therein."

By this ordinance the city was divided into certain sections or districts, called zones, which zones were classified under the designations "A," "B," "C" and "D," as shown by the map here in evidence. The territory included, in Zone "A," was left unrestricted; Zone "B" was restricted against manufacturing use; Zone "C" was restricted against manufacturing and business use, while Zone "D" was restricted against manufacturing, business and tenements.

Section 5 of said ordinance provided that—

"No building or buildings shall be hereafter located, erected, used or maintained in Zone 'D,' as a tenement building, place of business, or manufacturing plant, intending hereby to restrict Zone 'D' for use as single and double residence property only."

In the month of July, 1919, the relator, Max Morris, a building contractor, acquired certain property, located on Grasmere street and Stanwood road, in the city of East Cleveland, and located about 150 feet south of Euclid avenue; this property being within Zone "D."

The relator filed his applications for building permits to erect eight apartments on this property, these apartments being buildings of the class not permitted to be erected by the ordinance within Zone "D." Thereafter, and after the passage of the ordinance, the defendant, M. W. Garnett, building inspector of the city of East Cleveland, refused to issue the permits. The application for permits, and the plans and specifications filed therewith, were in full compliance with the building code of the city of East Cleveland, and the building code of the state of Ohio. The permits were refused by the defendant, M. W. Garnett, building inspector of the city of East Cleveland, specifically and solely upon the ground that the erection of the

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proposed apartments would be contrary to and against the provisions of the ordinance here in question.

It is claimed by the relator that the ordinance, under which the permission to build was refused to him, is void, in that it works a taking of his property without compensation, and without due process of law, and that it denies him the equal protection of the laws, in violation of the Constitution of Ohio, Article I, Section 1, and Section 19; the Constitution of the United States, Article XIV, Section 1; the Fourteenth Amendment, Section 1 and the Fifth Amendment.

The defendants allege that the ordinance is a valid exercise of the police power, granted to the city under the Constitution of the State of Ohio, which provides (Art. XVIII):

“Sec. 3. Municipalities shall have authority to exercise the powers of local self-government, and to adopt and enforce within their limits such local, police, sanitary and other similar regulations as are not in conflict with general laws.”

“Sec. 7. A municipality shall have the power to frame, adopt or amend the charter for its government, and may, subject to the provisions of Section 3 of this Article, exercise thereunder all powers of local self-government.”

By the charter of East Cleveland, Section 1, it is provided that it—

“may define, prohibit, abate, suppress and prevent all things detrimental to the health, morals, comfort and safety, convenience and welfare of the inhabitants of the city, and all nuisances and causes thereof.”

There is no question made here, but that the city of East Cleveland, under its charter, possesses the same police power, in relation to any municipal affairs, that is possessed by the state, in relation to affairs of the state at large, and could pass any ordinance with respect to such municipal affairs, of the same scope and effect that a statute of the state might have, in relation to the same purpose or object, and that its authority in this regard is subject to the same constitutional limitations as the authority of the law-making bodies of the state.

Certain claims, heretofore made by the relator, are, in this hearing, not urged upon the court. The case is presented to this court upon the one proposition, namely, that the ordinance in question is not a valid enactment within the police power of the city of East Cleveland.

The claim that the restrictions imposed upon the property of this relator constitute a taking of his property without due process of law, is included in the issue so stated. It has been held so frequently and so uniformly that the state may, in the lawful exercise of its police power, impose restrictions upon the use of private property, and that such restrictions do not constitute a "taking" of property, within the inhibition of the Fourteenth Amendment of the Constitution of the United States, that that question seems no longer open to discussion. (Collection of authorities in *Opinion of Justices*, 103 Me., 506, 19 L. R. A. (N. S.), 422.) Such statutes extend to and include reasonable regulations governing the location, erection and maintenance of buildings. 12 Corpus Juris, 1265, Sec. 1069.

The extent of the police power of the state has been stated by the courts, almost time without number, in almost the same language.

"The police power is an attribute of sovereignty, and has its original purpose and scope in the general welfare, or, as it is often expressed, the public safety, public health and public morals. These terms indicate its field, yet its boundaries are necessarily vague and undefinable." *Mirick v. Gims*, 79 O. S., 174.

"The state is necessarily invested with a police power, which is the expression of the popular conception of the necessities of social and economical conditions, and under which may be done that which will best secure the peace, morals, health and safety of the community." *Bloomfield v. State*, 86 O. S., 253.

"The state and municipalities may make all reasonable, necessary and appropriate provisions to promote the health, morals, peace and welfare of the community, but neither the state nor municipality may make any regulations which are unreasonable. The means adopted must be suitable to the end in view, must be impartial in operation, and not unduly oppressive upon individuals, must have a real and substantial relation to their purpose, and must not interfere with private rights beyond the necessities of the situation." *Froelich v. Cleveland*, 99 O. S., 000, syllabus 3.

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This ordinance, then, is not a valid exercise of the police power only (1) if it does not come within the purview of that power, by promoting the health, morals, peace and welfare of the community, or (2) if it is unreasonable, arbitrary, discriminatory, and not uniform in operation.

There has been apparently no subject which has been more prolific of litigation than that involving the extent of the right of the state to limit the use of private property, under the police power. This follows naturally from the very statement of the scope of that power.

It is said to be "vague and undefinable." 79 O. S., *supra*.

"It is not subject to definite limitations, but is co-extensive with the necessities of the case, and the safeguarding of public interests." *Canfield v. U. S.*, 167 U. S., 518.

"It is the most essential of powers, at times the most insistent, and always one of the least limitable of the power of government." *Eubank v. Richmond*, 226 U. S., 137.

The police power, being thus undefined, and the individual who, in ordinary times, will accept any limitation upon the use of his property for the general welfare, and rest content with the thought that "he is rewarded by the common benefits secured" (109 Mass., 315, 318), being very rare, the courts have been asked to pass upon the validity of each new exercise or extension of that power. No one today, I take it, would question the right of a municipality, under its police power, lawfully to limit to certain districts slaughter houses, corrals, livery stables, laundries, carpet-beating establishments, etc. Not only would we consider that there was no question that this might lawfully be done, but we would consider that there never could have been any question that it could be done. Yet the books disclose that the validity of the laws so limiting these industries were attacked in the courts upon precisely the same grounds as are urged against the ordinance here in question. The law, as laid down in those cases, is precisely the same as it is held today. The law has not changed, but the application of the law has kept pace with changed conditions, conditions both material, and of public thought. These conditions have so changed, since it was considered the right of the state to

interfere with the use of private property, even to the extent of limiting its use, as a slaughter house, was debatable, that it is now held that regulations limiting the height of buildings, the material to be used in their construction, and all of the other minute limitations of building ordinances, fire district ordinances, etc., are too well established to be questioned. *Welch v. Swasey*, 193 Mass., 364, 373.

The development in the application of the law, in this regard, has been in sympathy with the change which has taken place generally from the conception that the law should jealously guard the right of the individual to use his property as he saw fit, subject only to the condition that he did not maintain a public nuisance thereon, to the conception that the state or community has a very definite interest in the use of private property, and that the use of such property may be very broadly limited in the interests of the community in general. As Professor Tiedeman says:

“In years gone by, a man was at liberty to build his house or other building as he pleased, and of what he pleased. He could imitate the example of the biblical wise man, and build it upon a rock, or, foolishly following the precedent of the foolish man, he could build it upon the sand; and no government official could interpose an objection. But this individualistic license no longer is permitted. Public opinion recognizes the indubitable fact that the builder of the house or other structure is not the only one who is interested in the character and method of its construction.” *State & Federal Control of Persons & Property*, Vol. II, Sec. 150.

It would seem that there could be no two opinions upon the proposition that the apartment house, or tenement, in a section of private residences, is a nuisance to those in its immediate vicinity. Under the evidence, and as a matter of common knowledge, of which the court may take judicial notice (16 Cyc., 582), it shuts off the light and air from its neighbors, it invades their privacy, it spreads smoke and soot throughout the neighborhood. The noise of constant deliveries is almost continuous. The fire hazard is recognized to be increased. The number of people passing in and out, render immoral practices therein more diffi-

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cult of detection and suppression. The light, air and ventilation are necessarily limited, from the nature of its construction. The danger of the spread of infectious disease is undoubtedly increased, however little, where a number of families use a common hallway, and common front and rear stairways.

The erection of one apartment house in a district of private homes would seriously affect only those persons living in the immediate vicinity thereof, but the common experience is, that the erection of one apartment drives out the single residences adjacent thereto, to make way for more apartments. The result is that, in time, and not a very great time, when one apartment is erected, the whole street is given over largely to apartment houses.

With the growth of its population, it appears to be practically certain that unless restricted, the greater part of East Cleveland will be built up with apartments, and the home owners must choose either to adopt apartment life or abandon their depreciated property, and move out of the city or into its more remote parts.

If the claim of the relator here is sound, a city of private homes, grass plots, trees and open spaces, with the civic pride and quality of citizenship which is usually found in such circumstances, is powerless to protect itself against the obliteration of its private residence districts, by apartments, which shut out the sun and sky from its streets, and one another, and are generally owned by those whose greatest interest is the revenue that the building will produce. If such is the law, it must be conceded that it is unfortunate.

The apartment house is, for many, a desirable convenience, and, for some, a necessity. They are a recognized necessity in cities of any size. Their erection should not be prohibited, and under this ordinance, are not prohibited. Private residences, with yards for play spaces, with grass, trees and flowers, are necessities for people with children, and as much a convenience to the people without children, who take an old-fashioned pride in owning their homes, as is the apartment to those who are willing to accept its restrictions, for its compensatory freedom from responsibilities. It is at least equally important to the

community to preserve the private home for this class, as it is to provide the apartment for the first. Under this zoning ordinance, both the private home is preserved, and the apartment house is provided.

It seems eminently fair to restrict the apartment-house builder to a limited area, where his use of his property will do the least damage to others, and to the community. The necessities or convenience of those who live in them will be served thus with the least sacrifice of the necessities and conveniences of others. Whatever of the burdens arising from apartments there are, will be borne by those whose purposes they serve, and not shifted to the other property owners of the city, to make their property unfit for use as a home.

The burden is upon the relator to show, by clear and satisfactory evidence, that the ordinance does not promote the health, morals, peace or welfare of the community. The question is really one of fact, and in all of the decided cases, the conclusion reached merely records the opinion of the judges with whom the decision rests. *Lachtman v. Houghton*, 134 Minn., 226, 229.

In the opinion of this court, the principles so frequently enunciated by the courts, in those cases in which the validity of laws restricting the use of private property have been upheld, apply in this case, and that the least that can be said is that it has not been shown by the relator that the ordinance is not necessary to promote the health, morals, peace or welfare of the city of East Cleveland.

It seems that there is no reported case in which the validity of a comprehensive zoning ordinance like the one in this case, has been passed upon by any court. There are numerous cases in which, by ordinance or statute, it has been attempted to protect private residence districts. In the majority of the decisions, it is fair to say, where the law has been one, the prohibitions of which were similar to the ordinance here in question, it has been held not a valid exercise of the police power.

In the case of *State, ex rel Samuel Lachtman, v. Jas. G. Houghton*, 134 Minn., 226 (Nov., 1916), the court held that—

“An ordinance prohibiting the owner from erecting a store building upon land within a residential district can not be

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sustained as a legitimate exercise of the police power, and is an unlawful invasion of the right secured to him by the Constitution."

Of the five judges composing the court, three concurred in the decision and two dissented. The opinion of the court, written by Judge Taylor, and the dissenting opinion, by Judge Hallam, collect and review the authorities, and each opinion constitutes a complete presentation of the opposite sides of this question. Judge Taylor says, p. 237:

"The police power of the state is very broad, but not without limits. Under it the legislative power may impose any reasonable restrictions and may make any reasonable regulations, in respect to the use which the owner may make of his property, which tend to promote the general well-being or to secure to others that use and enjoyment of their own property to which they are lawfully entitled; but when the legislative power attempts to forbid the owner from making a use of his property which is not harmful to the public and does not interfere with the rightful use and enjoyment of their own property by others, it invades property rights secured to the owner by both the state and federal constitutions. Only such use of property as may produce injurious consequences, or infringe the lawful rights of others, can be prohibited without violating the constitutional provisions that the owner shall not be deprived of his property without due process of law nor without compensation therefor first paid or secured. That the right of a property owner to erect a store building upon his land is within the protection of these constitutional provisions, and can not be taken away under the guise of a police regulation, is so universally recognized that an extended search has failed to disclose any decision holding otherwise either in fact or in principle. We are forced to the conclusion that the ordinance in question can not be sustained in so far as it prohibits the erection of ordinary store buildings. This does not mean, however, that it is not valid in so far as it applies to structures or occupations which are within the regulatory domain of the police power."

Judge Hallam, dissenting, says (p. 238):

"I enter upon the discussion of the question realizing that some of the views which I entertain are opposed to the greater number of decisions. This is always a consideration of importance, for decisions of courts are usually arrived at with thought-

ful care, yet we should not overlook the fact that precedent is sometimes followed with too much obedience. It should be said, however, that there are some well considered decisions in harmony with the views here expressed, and also that the preponderance of authority the other way is not so great as would at first appear from the cases cited. Many of these cases involve only common law rights and the right of the court to impose restrictions; others involve only the construction of statutes or charter provisions and decide no constitutional questions at all.

"We must take judicial notice of some of the things which everybody knows. In every city and every hamlet there are business districts and residence districts more or less distinct. They are located by certain logical laws of trade and conduct. The business district is central; the residence district, suburban. As the city grows the central business district becomes inadequate for all the city's business needs. Accordingly, local business districts spring up, and they too are in a general way separated from the residence districts. Usually these follow lines of traction. No government has planned this separation. Without any definite plan, the intuitive efforts of the mass of people of every community has been devoted more or less consciously to maintain this separation. The fact is that people generally recognize that a business district is not the best place for a family home. The man of thrift, whether of large means or small, looks forward to a home out from the center of business activities, where he may live upon a plot of ground more or less ample in space, suitable for the bringing up of a family. The consideration is partly aesthetic, but it is in far greater measure purely practical. The prompting motives are, better light and air, better moral surroundings, and better conditions for recreation. The result is that districts spring up devoted exclusively to the building of homes.

"We are not concerned with the question whether such homes are large or small. When a city block has been devoted to the building of homes, with the incidental breathing spaces about them, the property in the district acquires a value by reason of that exclusive use. The effect of the erection of a business structure in a residence block is well known. To an extent it changes the character of the locality from residence to business. It is a matter of common knowledge that the erection of a single grocery store, with its characteristic architecture and mode of construction and operation in a block theretofore devoted exclusively to homes, annihilates the value of residences round about. The reasons for this depreciation in value are the same as those which in the first instance prompted home owners to locate their homes away from the center of trade.

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“It is said this relator has a vested right guaranteed him by the constitution to damage his neighbor’s homes by devoting his lot to a use incongruous with the use of property in the vicinity, and that no power can stop him, for to stop this damage would be to take his property without due process of law. If it be said that the owner of a lot in a district of homes has the vested right to use it as he sees fit, notwithstanding the damage to his neighbor, then what of the right of his neighbor whose property value he destroys? Has the one a vested right to destroy and the other no right at all to be protected? In my judgment this slaughter of property value is something the legislature has power to prevent. Courts have exercised the power to abate what they have denominated nuisances at common law. This grocery store was not a nuisance at common law. But it does not follow that the legislature may not regulate the location of business structures that were not nuisances at common law. It may do so. * * *

“In my opinion the foregoing facts furnish a justification for restriction by the state of business structures in a residence district. The fourteenth amendment has not abrogated the police power of the state. What may be done by the state under the exercise of that power without conflict with the fourteenth amendment is a federal question, upon which the federal supreme court has often spoken.”

The same court, in *State, ex rel Twin City Building & Investment Co., v. Houghton, etc.*, 174 N. W., 885, Oct. 24, 1919, holds:

“Condemnation can not be had for a use which is not public, and the condemnation of property against its use for an apartment building * * * is not a public use.”

The court divides, three to two, in the same manner as in the case above cited, and the opinions are in conformity with those expressed in that case. This case was an action in mandamus to compel the issuance of a permit to build a three-story apartment. The majority opinion in this case is written by Dibell, J., who says (p. 886):

“The use to which the relator purposes putting its property is legitimate. Not all people can live or wish to live in detached houses. Some from choice and some from necessity seek apartments. It is true that apartment buildings are not welcome in

exclusive residence districts. Their appearance is not liked. They bring more people into the neighborhood and their presence there and their going and coming is thought by some undesirable. It is not sought to prohibit apartments, nor to prevent people living in them. It is proper enough that apartments be located elsewhere and that people live in them there, for the living conditions they offer are wholesome and the people who use them are good people. They are banned because of the environment. An apartment building does not affect the public health or public safety or general well-being so that it may be prohibited in the exercise of the police power. This we take to be the effect of our decisions."

Judge Holt writes the dissenting opinion (p. 888):

"The legislature, in the first instance, must ascertain and determine what makes for public welfare in enacting laws designed to secure or promote the same. Courts should not lightly set aside such determination. Reference need only be made to a few of the many existing conditions which would seem to justify the law here questioned. People are crowding into cities, where the individual ownership of land is restricted to small parcels. This calls for a delicate observance and application of the rule '*sic utere tuo ut alienum non laedas.*' Courts often use that rule to prevent or redress an injury. And why may not the legislature do likewise when occasion arises? A person buys a 30 or 40 foot lot in a residence district and erects a modest building for a home. Later others secure two or more lots on each side of him and proceed to erect three or more story apartments or business buildings, placing the structures clear up to the lot line. Is there any doubt but that the small home first built is utterly destroyed so far as comfortable enjoyment goes and its value almost entirely obliterated? * * * It is about time that courts recognize the aesthetic as a factor in the affairs of life. Who will dispute that the general welfare of dwellers in our congested cities is promoted, if they be allowed to have their homes in fit and harmonious or beautiful surroundings? Besides preserving and enhancing values it fosters contentment, creates a wholesome civic pride, and is productive of better citizens. City planning, by which mercantile and industrial establishments, hotels, apartments, and the individual homes are segregated, seems to me to be a public need that should invite the hearty co-operation of all the governmental departments."

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To the authorities cited by the judges in these cases should be added that of *Spann v. City of Dallas* (1916), reported in 189 S. W. Rep., 999, in which an ordinance of the same character as that in the 134th Minn., *supra*, is held to be valid.

The decision of this court follows the minority opinion, being fully convinced that it is within the police power of a city to preserve districts against the apartment; that the greater the proportion of private homes in a city, preferably occupied by the owners, the better the city, in health, morals, peace and welfare.

II. Is this ordinance invalid, because it is unreasonable, arbitrary, discriminatory, and not uniform in operation? It is urged that the ordinance does not apply to all of East Cleveland, nor to all parts similarly situated; that apartment buildings are permitted within 150 to 200 feet from the property of the relator, which is restricted against them.

In 12 Corpus Juris, 1128, the law is stated (Sec. 885):

“* * * The provisions of the Fourteenth Amendment to the Federal Constitution that ‘no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,’ have been construed to grant to all persons equality before the law, in the sense that they render void all state statutes which make any unreasonable or arbitrary discrimination between persons or classes of persons. * * * Under the provisions of the state and national constitutions the same rules are applied as to the validity of classifications made in legislative enactments * * * and neither the fourteenth amendment nor the provisions of the state constitutions prohibiting the granting of special privileges affect the validity of state statutes making reasonable classifications of persons or things for the various purposes of legislation. If there is a reasonable ground for the classification and the law operates equally on all within the same class it is valid. And this is true even though the act confers different rights or imposes different burdens on the several classes. * * * In determining whether or not a basis of classification is reasonable, it must be looked at from the standpoint of the legislature enacting it, the question of classification being primarily for the legislature.

A statute will be sustained where the basis for classification made by it could have seemed reasonable to the legislature, even though such basis seems to the courts to be unreasonable. Legislative discretion in this matter is not subject to review by the courts, except to the extent of determining whether the classification adopted is arbitrary, unreasonable, and unjust. As in all the other cases involving the validity of statutes, all reasonable doubts are to be resolved in favor of upholding the validity of legislation establishing a classification; and the legislative judgment as to classification can be overthrown by the courts only when it is clearly erroneous. Classification must be reasonable and not merely arbitrary. There is no general rule by which to distinguish reasonable and lawful from unreasonable and arbitrary classification. But in order that the act may be valid the classification must rest on real differences in the subject matter having some relation to the classification made and the objects to be accomplished by the legislation, and must affect alike all persons or things within a particular class."

It is apparently urged by the relator that this ordinance was conceived and passed only for the purpose of protecting the residents on Standwood and Grasmere avenue against his apartments. The evidence herein would tend to support a claim that the purchase of this property by the relator was the immediate occasion of the city taking up the question of a zoning ordinance. There appears to be no evidence, however, to substantiate the claim that the ordinance was drawn hastily and to meet only this particular case, and for the benefit of the residents of Grasmere and Stanwood streets, particularly. To the contrary, the record shows a systematic study of the conditions in the city, preliminary to the mapping out of the zones, and a careful preparation of the ordinance. It appears generally from the evidence, with particular reference to map, plaintiff's Exhibit "B" that the zones are fairly constructed, to carry out the purposes of the ordinance. Those parts of the city already largely devoted to manufacturing, are in Zone "A"; Zone "B" embraces chiefly the main thoroughfares; Zone "C," the districts where apartments are already numerous; Zone "D" includes the territory which is either free from apartments, or in which there is but an occasional building of this character.

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There are instances where it might appear that some street or section, in accordance with this general plan, should have gone into one zone, rather than another, but clearly this is not for the court to determine. The divisions made by the ordinance appear to be well within the legislative discretion, and not subject to be held arbitrary or unreasonable by this court.

In every such ordinance, where territorial classification is made, as in those establishing fire limits, the line is bound to permit to be done, on the property immediately adjacent to the line outside of the district, what is prohibited on that immediately adjacent within the district. If this constituted an arbitrary discrimination, no territorial classification ordinance could be lawful. The point so strongly urged, that the fact that apartments are permitted within 150 to 200 feet of the relator, shows an arbitrary discrimination against him, does not appear to be well taken. The apartments permitted are on Euclid avenue, a main thoroughfare, classified in Zone "B." Relator is upon a side street, classified in Zone "D." If the classification is reasonable—and the court can not say it is not—the fact that relator's property is close to the Euclid avenue property would not alter that fact, nor show any discrimination against him.

The questions here made appear never to have been passed upon in Ohio. The one case cited, *State of Ohio, etc., v. City of Cleveland*, 20 O. C. C. (N. S.), 538, except that it declares the power of the court to hold an ordinance invalid which is unreasonable, is not in point. The ordinance there in question prohibited the erection of any building for working of wood * * * within 16 feet of any lot line. The court said that this meant any lot line, and concluded (p. 542) :

"It would seem to us so clearly unreasonable to say that one owning property bounded by a street, river, lake or public ground must be restricted in the erection of a building, to 16 feet from that line, that we must declare the ordinance, in so far as it provides that the building shall not be within 16 feet of a lot line, unreasonable and void."

The general rule which must govern this court in construing

the ordinance is again stated in the recently reported case of *Josephine E. Leis v. Cleveland Ry. Co.*, Ohio Law Reporter, April 19, 1920, syllabus 3:

“When a municipality, in the exercise of the constitutional authority, has adopted local police regulations, to promote the public health and safety, every intendment is to be made in favor of the lawfulness of such regulations, and courts will not interfere except in clear cases of violation of the authority granted.”

This court is therefore of the opinion, first, that the ordinance here in question is a valid exercise of the police power by the city of East Cleveland, under the authority of its charter; second, that it has not been shown that the classifications made under this ordinance are unreasonable, arbitrary, discriminatory and not uniform in operation.

The petition of the relator therefore will be dismissed, and an exception given.

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Morrow v. Dirlam, Executor, et al.

**PARTS OF WILL INVALIDATED BY NEUTRALIZING AND
CONFLICTING PROVISIONS.**

Common Pleas Court of Richland County.

LOUISA STURGES MORROW ET AL V. HOWARD B. DIRLAM, EXEC-
UTOR OF THE LAST WILL AND TESTAMENT OF SUSAN
M. STURGES, DECEASED, ET AL.

Decided, September 17, 1919.

Wills—Conflicting Bequests to the Same Persons—Attempted Creation of a Trust Held to be a Charge—Children Held to Take per Stirpes—Gift for Furtherance of Provision Invalid—But for Woman Suffrage Valid—To Anti-Tobacco League Invalid—To Peace Societies Invalid—To Anti-Divorce League Invalid—To a Society Wrongly Named not Invalidated Thereby—Private Trust Engrafted on Charitable Trust—Provision for Construction of Will by Legal Adviser Invalid.

1. Where, a testatrix, in the first instance, in her will, by a separate paragraph, bequeaths to a brother and his wife, jointly, a certain sum of money absolutely; and where in a subsequent paragraph, it appears that the said sum of money is bequeathed in trust to them for their life and at their death to their children; and where in a further subsequent paragraph, it appears that the recipients of her bequests were given the right to use said fund in their discretion, and the executor authorized and directed to pay out said bequests, among others, the bequest in question outright to said legatees,

Construed: Said subsequent paragraphs or provisions therein are held to neutralize each other, to destroy themselves, and must be legally disregarded, and said initial paragraph to be a bequest absolute to said brother and wife.

2. Where, a testatrix, by separate paragraph in her will, bequeaths to a wife a certain sum of money, and in which bequest the income from one-half thereof is directed to be given to her husband, a brother of testatrix; and where it is shown that said brother died with issue surviving him, before testatrix,

Construed:—Said paragraph is held not to create a trust, but a charge only on said bequest, and the heirs at law of said deceased brother will not succeed to said income, but said charge is held to terminate at the death of said deceased brother, and said bequest to be absolute in said wife

3. Whereas, a testatrix, by a separate paragraph in her will, bequeaths a certain sum of money "to each of the children of my brother P.", and where it is shown that on the date of the execution of the will, said brother P, was then deceased, having been survived by three children, one of which children was then deceased, survived by issue; and where it was also shown that a second child of P. died with issue surviving him, after the execution of the will, but before the death of the testatrix, leaving only one of the children of P. surviving.

Construed:—Bequest to the children of the deceased brother P., does not lapse, but the provisions of Section 10581, General Code, are held to apply and control and the issue of said deceased children take the bequest to the respective parents.

4. Where, a testatrix, by a separate paragraph in her will, makes a bequest to a church, in the following language, "to M., one thousand dollars. This one thousand dollars is in addition to the one thousand I gave the church some years ago, but have held paying the church annually six per cent. (\$60.00)."

Construed:—Is held to be a bequest not for one thousand dollars but for two thousand dollars, one thousand dollars as a gift of a validated debt, and one thousand dollars as a present additional gift.

5. Where, a testatrix, by a separate paragraph in her will, makes a bequest of a certain sum of money to a women's Christian temperance union of a certain city in the state of Ohio, "for the promotion of purity, prohibition, total abstinence from strong drink and tobacco in all forms," in said city,

Construed:—In form and purpose a charitable trust and is not void for indefiniteness, and no part of the trust fails, since prohibition is not an accomplished fact in Ohio, nor is any expressed purpose therein illegal, since the promotion of total abstinence from tobacco in Ohio can be accomplished in a legal way.

6. Where, a testatrix, by a separate paragraph in her will, bequeaths a certain sum of money, "to the Ohio Woman's Suffrage Association," "to promote the cause of equal suffrage in Ohio,"

Construed:—In form and purpose a charitable trust, and does not fail, since equal suffrage in Ohio is not an accomplished fact, nor is said trust void for the reason that the Constitution of Ohio and the laws of Ohio have heretofore recognized only male suffrage, and since the cause of equal suffrage may be promoted in a legal way.

7. Where, a testatrix, by a separate paragraph in her will, bequeaths a certain sum of money to "the Anti-Tobacco League" for the purpose "to promote the cause of tobacco abstinence, to prevent advertisements of tobacco and its cultivation,"

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Construed:—In form a charitable trust, but void since no society or association of such name is shown to exist, and for the further reason, the express purpose contravenes established law, and public policy. Tobacco is no where contraband.

8. Where a testatrix, by a separate paragraph in her will, bequeaths a certain sum of money "to Peace Society of the U. S.," for the purpose of "special work in Ohio."

Construed:—In form a charitable trust but void, since no society, association or corporation of such name is shown to exist, and for the further reason the expressed purpose is vague, indefinite, and uncertain, and nothing is therein stated to render said assumed purpose definite. Said sum is lapsed to the heirs at law of testatrix.

9. Where, testatrix, by a separate paragraph in her will, bequeaths a certain sum of money, "to the Society for the Prevention of Cruelty to Animals, headquarters at Boston" (the National Society)", "for work in Ohio," and it being shown by extrinsic evidence that no society, association or corporation for said purpose of that name exists, but that there is existent and in active work, a corporation for said purpose in the city of Boston, national in scope, definite in mode of operation, and settled in purpose, plan and procedure in preventing cruelty to animals, known as "The American Human Education Society, Boston, Mass."

Construed:—The true intent and dispositive effect of said bequest is to bequeath and does bequeath said sum to the said, The American Humane Education Society, Boston, Mass., that said bequest, by reason of said wrong name or style, is not void, but valid, nor is said legacy, for said reason, lapsed to the heirs of the testatrix.

10. Where, testatrix, by a separate paragraph of her will, bequeaths "to the National Anti-Divorce League," for the purpose, "especially promoting a universal divorce law for the U. S.," and no league of such name or style for said purpose being shown existent,

Construed:—In form a charitable trust, but illegal, null, and void, since a universal divorce law by the various states of the Union is impracticable of attainment and, through a Federal law, legally impossible, under our dual government of states and nation, and said sum lapses to the heirs at law of testatrix.

11. Where, a testatrix, by two paragraphs of her will, attempts to dispose of the residue of her estate, real and personal, wherein two churches are vested with the naked legal title only to said residue, with no right, powers or duties in said attempted trust, and wherein it is directed that the pastors of said two churches, including four members from each of said two churches, together with four members from each of the evangelical churches of the city of

Mansfield, in all about one hundred and thirty persons, elected yearly shall constitute a board, the only function of which board is to select a smaller board, a so-called "administrative" board, to administer the income from rentals and interest on said residue, for the purpose, "of religious and philanthropic work in Mansfield, Ohio,—especially among children and young people, promoting among them Christian living,—the fruit of the Spirit,—as shown in Galatians, chapter 5, verse 22,—total abstinence from strong drink and tobacco in all forms,—rules of health, thrift and economy;" and where there is imposed on said residue, or the bequest thereof, "good house accommodations" for certain number of dependent relatives of testatrix and to them a certain annuity therefrom,

Construed:—In form to be a charitable trust, but null and void, for that a private trust is engrafted upon and superimposed upon an attempted charitable trust, for that the subject of the trust, to-wit: the net income from the residue is indefinite, uncertain and of doubtful existence, for that the general class of the beneficiaries is indefinite and uncertain, for that the express purpose of the attempted charitable trust, to-wit, the promotion of the "fruit of the spirit" is too general, is vague, indefinite and uncertain, and especially for that no mode or manner of execution is outlined or suggested by the testatrix, and no discretion in that respect is given to the trustees,—as a whole impracticable and unworkable,—each and all valid reasons, invariably so held by the courts as violative of the settled rules applicable to the creation of a charitable trust. Said residue passes as intestate property to the heirs at law of said testatrix.

12. Where, testatrix by a separate paragraph, provides, concerning the construction of her will by her named executor, saying: "I wish this writing construed as D. understands it as he has been my legal adviser."

Construed:—Void, and of no effect, since by the law of Ohio that function of construction of a will is vested alone in the Court of Common Pleas upon proper petition.

C. H. Workman, for plaintiff *et al.*

Howard B. Dirlam, contra.

GALBRAITH, J.

The petition herein was filed seeking construction of the will of Susan M. Sturges, deceased, and to have declared null and void certain items, or the whole, thereof because of alleged vagueness, indefiniteness, uncertainty, that certain parts are impos-

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sible of performance, and that they violate certain established rules of law governing such disposition by will, and it also involves the question of the passing of after-acquired real estate.

The estate sought to be disposed of by this will amounts to something over \$100,000 consisting of both personal and real property.

It appears by record and admission of counsel that all persons named as legatees, devisees and heirs of decedent are properly before the court by service or waiver.

The will, *verbatim et literatim*, is as follows:

The Last Will and Testament of Susan M. Sturges of 100 W. Park Ave., Mansfield, Richland Co., Ohio.

IN THE NAME OF THE BENEVOLENT FATHER OF ALL:

I, the said Susan M. Sturges, being of sound and disposing mind, and memory, considering the uncertainty of continuance in life, and desiring to make such disposition of my worldly estate as I deem best, do make, publish and declare, this to be my last will and testament; hereby revoking and annulling any and all former will or wills whatsoever by me made.

FIRST: I desire all my just debts and funeral expenses to be paid, as soon as possible after my decease.

SECOND: I give and bequeath

(1) To Arthur D. Sturges & Wife Nina W. Sturges & each of their children One Thousand Dollars.

(2) To Sarah Meade Sturges Wife of Willis M. Sturges Two Thousand Dollars & to each of their children One Thousand Dollars. The income of One Thousand Dollars given to Sarah Meade Sturges is to be given to Willis M. Sturges.

(3) To each of the children of my brother Eben Perry Sturges One Thousand Dollars.

(4) To Emily McKay Sturges widow of Effingham M. Sturges One Thousand Dollars. To Effingham McKay Sturges son of Effingham M. Sturges Five Hundred Dollars. To Emily McKensie Sturges daughter of Effingham M. Sturges Five Hundred Dollars.

(5) To Julia D. Sturges One Thousand Dollars.

(6) The *principal* of the amounts given to the *parents*, are to be kept in tact & at their death revert to their children—

(7) The above bequests are to be paid from the best securities in my estate—stocks bonds &c—When the securities mature

or if for any reason it is found best to sell them, the money shall be reinvested in Gov. Bonds. (U.S.) or first mortgages—The *income* from these bequests only shall be used or at least for ten years. then the principal if the recipient thinks best—The donor wishes each recipient to consider well before using the principal I wish my executor to pay each of these legacies, out right—and I trust to the honor of the recipient to respect my wishes as stated above.

(8) To the Mayflower Memorial Congregational Church of Mansfield One Thousand Dollars this One Thousand is in addition to the One Thousand I gave the church some years ago. but have held paying the church annually six (06) per ct—Int—(\$60.00) The income from all this fund is to be used to keep the *original* church building in repair—

(9) To the First Congregational Church of Mansfield One Thousand Dollars the income to be used to keep the church in repair—

(10) To the Frances E. Willard Women's Christian Temperance Union of Mansfield O. One Thousand Dollars, the income to be used for the promotion of Purity Prohibition. Total abstinence from strong drink & tobacco in all forms in Mansfield O. especially among the young—

(11) To the Ohio Women's Suffrage Asso—Harriet Taylor Upton Warren O—Pres. One Thousand Dollars—income to be used to promote the cause of equal suffrage in Ohio.

(12) To the Anti Tobacco League of the U. S. One Thousand Dollars income to be used to promote the cause of total abstinence from tobacco in all forms, to prevent advertisements of tobacco & its cultivation especially in Ohio—

(13) To the Peace Soc. of the U. S. Headquarters at Boston One Thousand Dollars. For special work in Ohio—

(14) To the Soc. for the Prevention of Cruelty to Animals Headquarters at Boston (The National Soc.) One Thousand Dollars for work in Ohio

(15) To the National Anti Divorce League—One Thousand Dollars—to be used especially for promoting a universal divorce law for the U. S. I wish my executor to pay the above bequests out-right—but each object named to keep Principal invested in Gov—Bonds or First Mortgages *Income* only to be used—

(16) To the Home Missionary Soc—The Foreign Missionary Soc (Am—Board) The Church & Parsonage Building Soc—S—S—& Pub. Soc—College & Ed—Soc—Am—Miss Soc—Especially for the Indians—Colored people & Chinese. All National Soc's of the Congregational Church Five Hundred Dollars each.

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These bequests to the Nat. Soc's of the Congregational Church I wish paid through the Women's Miss—Soc. of the First Congregational Church Mansfield. O

I wish bequests to my family connections to be paid *first in full*—if the assets of my estate do not allow the payment of the above charities in full I wish them paid Pro rata—my W. Park Ave Real Estate I wish left in tack—They must be paid in full or Pro rata from other assets—

(17) To the first Congregational Church of Mansfield Ohio and the Mayflower Memorial Congregation Church of Mansfield Ohio as residuary legatee of my estate—I bequeath the remainder of my estate & all my Real Estate on W. Park Ave Mansfield Ohio—the income to be used for religious & Philanthropic work in Mansfield Ohio—especially among children & young people promoting among them Christian living the Fruit of the Spirit as shown in Galatians Chapter 5—Verse 22—total abstinence from strong drink & tobacco in all forms—rules of health. thrift & economy—I wish these two church Pastors with two women & two men from each church (to be elected yearly by the several churches) to constitute a Board—in connection with the pastor & a man & woman (to be elected yearly by each church) from each of the Evangelical Churches of Mansfield this Board to elect five or seven from its membership composed of men & women equally to administer the income from this *trust*

I wish the Salvation Army to have the same representation as the churches—(i e) the head of the organization in Mansfield & one man & one woman—as member of the Board—I wish only total abstainers from strong drink &, tobacco to be on this Administration Board—or members of the larger or smaller board in any capacity—I do not wish any of this money appropriated to any church. I wish the property belonging to my estate to be kept in good order.

(18) If any of the children, grand children, or great grand children to the number of three of my father Edward Sturges Sr—should desire I wish they should have good house accommodations in the old homestead or some house standing on my property, fronting on W Park Ave—& if they should in the opinion of the *Administration Board* be objects of charity they shall receive Two Hundred (\$200.00) Dollars yearly, in these provisions the nearest of kin to my brothers shall have first choice—I earnestly hope this part of my bequest may not be necessary but consider it a wise provision

(19) My personal wardrobe I wish sent in tack (no part of it to be given away or used in Ohio) to Santee Mission Santee—Nebraska

(20) My household furniture & furnishings my heirs may purchase if they so desire at a low estimate first—then any of my family connections—under the same provisions—Any furniture or furnishings they do not purchase to be given to the furnishing of the Young Men's Christian Association of Mansfield O—as far as they desire—the remainder to the furnishing of the Salvation Army Headquarters in Mansfield or adjoining towns—I especially direct none of it shall be used in any *private house either by gift or purchase*

(21) I have made no special bequest to brother Charles M. Sturges or sister Mary D. Sturges as they have abundance

(22) I wish all these bequests to be considered as coming from my father & mother Edward Sturges Sr & Mary Mathews Sturges. & my sister Anna L. Sturges—

(23) I wish this writing construed as Mr. Howard B. Dirlam understands it as he has been my legal advisor—

(24) If possible I wish no appraisement made of my estate especially my personal estate.

(25) I would like this estate closed as speedily as possible.

I nominate and appoint Mr. Howard B. Dirlam to be the executor of this will

IN WITNESS WHEREOF, I have hereunto set my hand and seal this seventeen day of June in the year One Thousand Nine Hundred and 5

Susan Mathews Sturges (Seal)

Not only from the legal duty imposed, but because of acquaintance from boyhood and the highest of respect entertained for the deceased, the court would desire to aid in carrying out such disposition of her property as was desired or expressed by the testatrix, when possible, but it must be guided and controlled by rules of law governing construction and testamentary disposition, and for such latter reason, attention is directed—as preliminary—to certain well known and established rules:

“The judgment of a court in expounding a will should be simply declaratory of what is in the instrument.” (20 Ohio, 500.)

“The inquiry is not, what thought did the testator wish to express by the language used, but what thought has he (or she) expressed by the words and sentences used in the will.” (25 O. C. C. [N. S.], 494.)

“While the purpose of making a will is to express the inten-

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tion of the testator and the object of construing it is to ascertain that intent, yet this must be gathered from the words she has used. The inquiry is, not what thought did testator wish to express, but what thought has she expressed." (1 Redfield on Wills, 433.)

"*Courts* are careful to discover and enforce the testator's intention, but *can not make a new will for the testator*, and it therefore follows that they constantly refuse to ascertain the testator's intention except from the words which he used in his will. * * * *Hence the question* which the courts have constantly in mind is *not what the testator should have meant to do, or rather what words he meant to use, but, rather what did he by the words which he actually used.*" (15 N. P. [N. S.], 101.)

"It is the duty of the court to determine her intention from the language she has seen fit to use in the will; not to speculate from surrounding circumstances as to what her real intentions might have been." (23 O. C. C. [N. S.], 357.)

The intention to be sought for is not that which existed in the mind of the testator but that which is expressed in the language of the will.

Attorneys for the parties presented voluminous briefs, and in extended oral argument have presented hundreds of citations.

The court has examined and considered many of such cases and authorities, but, as has been said by the courts of this state:

"Usually so-called precedents are of little value in the construction of a will, for the reason that wills vary so greatly in their terms, and a conclusion as to one may be, usually is, of but little, if any, service in the construction of another." (15 N. P. [N. S.], 102.)

"Adjudicated cases in which the intention of the testator has been determined give little or no aid in arriving at the intention of the testator in another and different will." (3 O. C. C. [N. S.], 619.)

"Instruments of this character are so unlike in their terms, and the circumstances surrounding testators so unlike in their facts, that the decision of one case is not apt to aid in the determination of subsequent cases." (44 O. S., 533.)

"It has not been found of late years profitable to frequently report cases involving the construction of wills, the general

fact being that scarcely any two instruments of that character present the precise question in dispute." (72 O. S., 12; 15 O. S., 109; 87 O. S., 357.)

Coming now to the will in question—

The testimony shows this will to be a holograph. It will be noted that testatrix was careless in the matter of punctuation; some punctuation inserted that if a strict following of its rules was made would leave doubtful, or of no affect, the connection of certain words and phrases used; some of the sentences are so run together that it is difficult at first sight to arrive at a satisfactory conclusion as to their meaning or application.

Fortunately, from the standpoint that the will and its bequests must be sustained in construction of testatrix's intention if possible, under the rules first above stated, there is sufficient authority to the effect that—mere punctuation, if it renders doubtful or ambiguous the intention of the testatrix, may be disregarded if from other circumstances a reasonable construction of the testatrix's intention may be arrived at. 2 Elliott on Contracts, Sec. 1534; 6 O. N. P. (N. S.), 381; 25 O. C. C. (N. S.), 492.

It will be noted, in form, that the will—having been drawn on printed blank—contains but two "items," the first the regularly printed provision for the payment of debts and funeral expenses.

Item "second" contains all of the dispositive provisions, and others—twenty in number—which in the foregoing copy of will the court has designated for convenience of reference by separate numbering in parenthesis.

The first seven of such numbering are what might be denominated "relative" bequests; numbers (8) and (9) as "church" bequests; numbers (10) to (15), inclusive, as "charitable" bequests; (16) a "church society" bequest; (17) and (18) the residuary clauses, and an attempt to create a trust that the income from the balance of her property be used for religious and philanthropic work in Mansfield, etc., and also seeking to attach thereto and engraft thereon a superior charge in the nature of a private charity, of uncertain extent and time, for the benefit

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of certain relatives of testator—"children, grandchildren, or great-grandchildren, to the number of three, of testator's father," etc. And such bequests or clauses, in item second, are the ones for which construction is sought and on which question is made as to validity.

Considering these in order—bequest (1):

"To Arthur D. Sturges & wife Nina W. Sturges & each of their children One Thousand Dollars,"

on question of indefiniteness and uncertainty as to amount—whether joint or several.

It is suggested that it would appear from the context, and standing alone, that this bequest was of the sum of \$1,000 to the legatees collectively or jointly.

But it is also suggested by reference to bequest (2):

"To Sarah Meade Sturges, wife of Willis M. Sturges, for the use and benefit of both, Willis M. Sturges and Arthur D. Sturges both living at the time of the execution of the Will and being her, then, only surviving brothers—

it might be assumed that the testatrix would desire to equalize her bequests to such two living brothers. It appears to the court that to take such view and construction would be mere speculation.

So far as the language of the bequest (1) is concerned it would appear from association of names and method of phrasing that the bequest to "Arthur D. Sturges & wife Nina W. Sturges" was joint and not several, and that it was the intention of testatrix that such husband and wife should receive \$1,000 jointly. This construction is aided by testatrix's placing of the sign "&" and the word "each" following her naming of husband and wife and before the words "of their children"; so, in the opinion of the court testatrix gave, by such bequest, to "Arthur D. Sturges & Wife," jointly, the sum of \$1,000; and to their children (and extrinsic evidence shows these are four), each the sum of \$1,000, making the total amount of this bequest \$5,000.

On the question—of this item—whether the bequest to Arthur D. Sturges and wife was absolute—

Attention is called to clause or paragraph (6) which provided:

“The *principal* of the amounts given to the *parents* are to be kept intact, and at their death revert to their children.”

And it is suggested by counsel that “the force and effect of this provision (6) is to cut down or limit the legal effect of paragraph (1), making the bequest one for the use of Arthur D. Sturges and wife during their life, or in trust to Arthur D. Sturges and his wife for life, and at their death to their children; that this may be the proper construction giving effect to both of these provisions; that if these provisions be considered repugnant, then they neutralize each other, or if we disregard the former and accept the latter, we reach out for a conclusion, a trust fund.”

If there was no further reference to this bequest and condition in this will the court might easily construe the intention to be to create a life and a trust estate, for such amount to such parties. But later in paragraph (7) of the will testatrix says:

“The above bequests are to be paid from the best securities in my estate—stocks Bonds &c—When the securities mature or if for any reason it is found best to sell them, the money shall be reinvested in Gov Bonds. (U.S.) or first mortgages—The *INCOME* from these bequests *ONLY SHALL BE USED, OR AT LEAST FOR TEN YEARS, THEN THE PRINCIPAL IF THE RECIPIENT THINKS BEST.*

THE DONOR WISHES EACH RECIPIENT TO CONSIDER WELL BEFORE USING THE PRINCIPAL. I WISH MY EXECUTOR TO PAY EACH OF THESE LEGACIES OUTRIGHT—AND I TRUST TO THE HONOR OF THE RECIPIENT TO RESPECT MY WISHES AS STATED ABOVE.”

And, again, in paragraph (16):

“*I Wish bequests to my family connections TO BE PAID FIRST IN FULL.* If the assets of my estate do not allow the payment of the above charities in full I wish them paid Pro rata—etc.”

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(The above capitalization is by the court to draw special attention.)

If the testatrix intended to vest a life estate only, and in trust, for the parents, she created such "parents" trustees for themselves, with authority to use their own judgment and discretion as to compliance with the restrictions and reservations, and as to their use of the principal. She directs payment to them outright by her executor, and she trusts to their honor, as recipients, to carry out her instructions.

Testatrix places it in the power of the recipients to entirely, and immediately, disregard such instructions and no court would have power to correct or prevent such abuse without going contrary to her directions that such bequests should be paid outright to the parties named.

The original bequest paragraph (1) is of an absolute estate in form; the later provision in paragraph (6) purports to reduce it to a life estate.

The ordinary rule of construction is that when two bequests are inconsistent, the latter will prevail if the two can not be so reconciled as to give effect to both.

But the latter paragraphs (6), (7) and part of (16) are so contradictory of effect and vest such discretion in the recipient that in the opinion of the court they in effect destroy themselves and must legally be disregarded and the bequest to Arthur D. Sturges and wife be held to be absolute. (See 40 Cyc., 1607-1610.)

As to bequest (2):

"To Sarah Meade Sturges wife of Willis M. Sturges two thousand dollars & to each of their children one Thousand dollars. The income of one thousand dollars given to Sarah Meade Sturges is to be given to Willis M. Sturges."

It is contended by counsel for plaintiffs that this bequest to the wife is in fact, in effect, \$1,000 to Sarah Meade Sturges and \$1,000 in trust for her husband—Willis M. Sturges—from which he was to have the income during life, and that as Willis M. Sturges died before testatrix his \$1,000 would lapse, or pass to his heirs under General Code, 10581; and that in either event

that this bequest is limited by paragraph (6) to a life or a trust estate as to "parents" as was contended as to Arthur D. Sturges and wife in paragraph (1).

The court can not reconcile this suggestion of construction with the plain language of paragraph (2) and legal rules.

The language used plainly indicates, to the mind of the court that the principal of \$2,000 was given to Sarah Meade Sturges absolutely, but that the income from \$1,000 thereof was "to be given to Willis M. Sturges."

From the language used the court is of the opinion that this income was personal to Willis M. Sturges and had he lived he would have been entitled to the same during his life, that it was a charge upon such portion of the bequest to Sarah Meade Sturges, and it was a trust to such extent, but at his death such trust and charge would have terminated, and that inasmuch as he died before testatrix that the said Sarah Meade Sturges takes such \$2,000 absolutely and free from any charge to the heirs of Willis M. Sturges.

As to the effect of paragraph (6) and other provisions of the will—what was said as to its weight on the bequest to Arthur D. Sturges and wife, would apply equally to the bequest to Sarah Meade Sturges, and the court is of the opinion that under paragraph (2) Sarah Meade Sturges takes \$2,000 absolutely, and the children of Sarah Meade Sturges and Willis M. Sturges (two in number, as shown by extrinsic evidence) each are to receive the sum of \$1,000.

As to bequest (3):

"To each of the children of my brother Eben Perry Sturges one thousand dollars."

Extrinsic evidence shows that Eben Perry Sturges was deceased at the time this will was made; that he had three children: Effingham M. Sturges, who died August 12, 1903, before the will was made, Eben Perry Sturges, Jr., who died Feb. 21, 1908, and Louisa Sturges Morrow who is still living.

The evidence shows that Effingham M. Sturges was survived by a widow and two children—Effingham M. Sturges and Emily

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McKenzie Sturges, for whom bequests are made in paragraph (4); Eben Perry Sturges, Jr., was survived by a widow and one son, an infant, Edward Quinby Sturges for whom no provision is made in the will.

It is suggested that the testatrix knew that Effingham McKay Sturges was deceased and making provision for the children of her brother Eben Perry Sturges, she intended to make provision for only the children of her brother then living, that is to Eben Perry Sturges, Jr. and Louisa Sturges Morrow.

In face of the express language of the bequest and the force and effect of General Code 10581, this suggestion is only based on speculation and can be of no avail, and distribution under this bequest should be, to— Effingham McKay Sturges, \$500; Emily McKenzie Sturges, \$500; Edward Quinby Sturges, \$1,000; Louisa Sturges Morrow, \$1,000.

As to bequest (4):

It is suggested that this paragraph is clear and explicit and that no uncertainty arises in its construction, save and except the amount bequeathed to the widow Emily McKay Sturges, one thousand dollars, which would be subject to the provisions of paragraph (6)—a bequest to a parent—a trust and not an absolute estate.

What has already been said as to the weight and effect of paragraph (6) as to the bequests to Arthur D. Sturges and wife and Sarah Meade Sturges, would apply equally to this bequest to Emily McKay Sturges, and it is the holding of the court that Emily McKay Sturges takes the bequest of \$1,000 absolutely.

No uncertainty exists as to bequest (5).

Former reference to paragraphs (6) and (7) makes further interpretation thereof unnecessary except to say that under paragraph (7) the executor is to distribute the foregoing bequests in kind and outright to the legatees named.

As to bequest (8):

“To the Mayflower Memorial Congregational Church of Mansfield One thousand dollars this one thousand is in addition to the one thousand I gave the church some years ago, but have held paying the church annually six (06) pr ct Int (\$60.00) The in-

come from all this fund is to be used to keep the original church building in repair.”

It is suggested that “the only question arising on this legacy is as to the calculation of the interest, if any, upon the legacy of \$1,000. It appears to be the intent of the testatrix to complete the execution of a gift of \$2,000, *only* \$1,000 of which *HAD BEEN PAID* together with interest of \$60 per year on the \$1,000 of the gift which the testatrix had withheld.

If these be the facts, then it would appear reasonable that the Mayflower Memorial Congregational Church under the provisions of this bequest is entitled to \$1,000, and the *interest* thereon at six per cent. from the date when testatrix ceased to pay, to be established by the evidence.”

In other words this suggestion by plaintiffs’ counsel is that this bequest should be construed, and it is a fact, that Susan M. Sturges had paid the original gift of \$1,000.

From careful reading of the bequest the court is of the opinion that its language does not sustain such suggestion.

To the court’s mind the language of the bequest appears to suggest that \$1,000 was given some years ago (perhaps in form of a promise or subscription) but held (actual payment withheld) paying the church annually six per cent. interest (\$60.00) thereon.

This was a matter which should have been settled by extrinsic evidence, if possible.

The only person whose testimony was presented on this question was Rev. Dr. D. G. Blair, pastor of such church, who has only been such pastor for the past three years.

He presented memoranda of the church books which show that receipt of the \$60.00 interest on S. Sturges repair fund commenced in the year 1907, and was paid each year thereafter to and including the year 1916, and that no payments of such interest was made thereafter. He found no church records which would show that the \$1,000 of principal for church repair fund had ever been paid and had been unable to get any information that such principal was paid.

Counsel both for plaintiffs and defendants stated they had

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no information whether the principal of original gift, referred to in the bequest, had been paid.

From the language of the bequest, and this condition of the evidence, it is the holding of the court that by this bequest the testatrix meant to validate the original gift of \$1,000, which was withheld and on which she had paid interest, as a debt against her estate, for such amount and for the interest thereon which was unpaid at the time of her death, and to give an additional \$1,000 to such church for the same purpose—"the income from *all* of this fund to be used (by such church) to keep the *original* church building in repair;" and the executor is directed to pay the second \$1,000 under this bequest, and interest on the original bequest from and including the year 1917, and also as a validated debt the principal of the original gift of \$1,000 unless he is able to find satisfactory legal proof, or it is admitted by such church, that the principal of such original gift had been paid during the life of testatrix.

No question is made as to paragraph, or bequest (9). It is clear and explicit.

As to bequest (10):

"To the Frances E. Willard Woman's Christian Temperance Union of Mansfield, O. one thousand dollars, the income to be used for the promotion of Purity Prohibition, Total Abstinence from strong drink & tobacco in all forms in Mansfield, O. especially among young."

In form and purpose a charitable trust.

It was suggested by counsel that the legality of that purpose is questionable. That "it is fundamental that a will must be lawful, that is it must direct a lawful thing to be done." That "any direction to do an unlawful thing would be void and any funds bequeathed for an unlawful purpose would be void."

The court can not see where "the promotion of * * * * Prohibition, total abstinence from strong drink and tobacco in all forms in Mansfield, O. especially among the young" is unlawful; surely the promotion of "purity" is not unlawful, and it is easy for this court to presume, and in fact it knows, from its knowl-

edge of the personnel of this organization, its purpose and accomplishments that it would not seek to exercise this trust in an unlawful way.

It is also suggested that part of this bequest—Prohibition—has been accomplished and the question is asked—do the rest of the purposes fall with that accomplished, and the entire legacy lapse? Prohibition appears to be accomplished in part. Some assert that it is not accomplished and will not be until complete ratification; which if not occurring the fight, at least in certain of its phases, is still on.

Even if it was admitted that it is fully accomplished, the purposes of this bequest are so associated and the authority for use of income so generally given, to a society of such established purposes that the suggestion as to partial lapse and failure of entire bequest appears to be without substantial foundation.

The purposes of this society, its plan of work, its mode of operation is declared and has been so worked out for years; and, in general, the language of this bequest is sufficiently definite as to its application of income (see 105 Wis., 485), among a number of purposes, that this court has no hesitancy in pronouncing this bequest legally sound and to direct that the executor shall pay the same to such legatee.

As to bequest (11):

“To the Ohio Woman’s Suffrage Asso.—Harriet Taylor Upton, Warren, O.—Prs—one thousand dollars—income to be used to promote the cause of equal Suffrage in Ohio.”

It is suggested by counsel:—“This is a charitable trust, but whether legal or illegal the courts of final resort in the United States are divided. The case of *Garrison v. Little*, 75 Ill. App., 402, holds such charity to be legal, the purpose in the bequest in that case being phrased as follows:

“To be used by them (trustees) according to their best judgment for the attainment of Woman’s Suffrage in the United States of America and its territories.”

“The case of *Jackson v. Phillips*, 14 Allen (96 Mass.), 539, holds such a trust to be invalid, because it was to the effect that

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a change should be made in the Constitution before any such efforts could be deemed to be lawful.”

“What an Ohio court has to say on this subject is yet to be announced.”

“The question is vital and fundamental. Suppose the bequest was to the effect that electors should be limited to property holders, that is freeholders, would any person contend that a bequest for this purpose, when our state Constitution granted the elective franchise to all persons of twenty-one years of age, or all male persons of twenty-one years of age, irrespective of property rights, or the possession of property rights, would be legal? Would a court enforce such a trust against the provisions of the Constitution?

“Or would the court promote or foster, or protect a fund and trustees, the purpose of which is to negative and neutralize or overthrow one of the fundamental principles of the Constitution?”

The court is not unmindful of the fact that his oath of office among other things requires him to support the Constitution of the state of Ohio, and that the Constitution is the fundamental law of the state.

But the court is not of the opinion that this required support would compel courts to blindly accept its existing provisions to such extent as to block, by legal decision or order, legitimate efforts or action for its change or amendment, or to hold invalid bequests of money seeking to aid change or amendment the purpose of which is lawful, and the means for attainment of which were lawful.

There are lawful ways to work the proposed changes in our fundamental law, and it must be assumed that the legatee and trustee named would only operate in a lawful way.

It was also suggested by counsel that woman suffrage has been attained in Ohio, and that the purpose being accomplished, the necessity for its support fails and the legacy lapses.

As to this latter suggestion the court will assume judicial knowledge that at this time legally authorized efforts are being made to have rescinded or nullified the act or amendment to extend the elective franchise to women.

For this reason it can not yet be said to be an accomplished fact.

If, as is suggested by counsel, the courts of this state have not spoken on the subject of bequests of this character and what our courts have to say thereon is yet to be answered, this court is prepared to say, and does say, as to this particular bequest and its language, that the testatrix has provided a legal trust for a legal purpose, that the purpose has not yet been fully attained, that the same should not lapse from the present condition of the object, and that if an association exists as named and of such location, that the amount of this bequest should be distributed thereto.

As to bequest (12):

“To the Anti Tobacco League of the U. S. one thousand dollars income to be used to promote the cause of total abstinence from tobacco in all forms, to prevent advertisements of tobacco & its cultivation especially in Ohio.”

If this bequest had stopped at the comma, and there was in existence such a league or society as named to whom payment could be made, such bequest would be upheld for the same reasons upon which bequest (10) is upheld; but in attempting to go to an extent of preventing the cultivation of tobacco in Ohio and to prevent advertisements of tobacco in Ohio, testatrix seeks to interfere with industry, trade and commerce and even interstate commerce, in an article which all of the laws of this state and of all other states recognize as lawful.

Tobacco, nowhere to the court's knowledge is a counterband, as alcohol, absinthe, opium, cocaine, etc.

To the court's view the purpose in the provision in bequest (10) and the provision in this bequest are vastly different.

In bequest (10) the purpose appears to be the promotion in a lawful way of changes in the habits of the people so as to bring about abstinence in the use of tobacco; while in this bequest the purpose is of positive interference with trade and commerce recognized everywhere as lawful, and it is therefore against public policy, unlawful and void.

As to bequest (13):

“To the Peace Soc. of the U. S. Headquarters at Boston one thousand dollars for special work in Ohio.”

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Extrinsic evidence shows that correspondence addressed to the above named legatee was, in absence of a society of such name, delivered to the World Peace Foundation of Boston, Mass. Resulting correspondence, received by counsel, from a judge of the U. S. Circuit Court of Appeals, other federal officers and the mayor of the city of Boston, state that there is no society of such name; that there are, beside the "Foundation" two other "peace" societies in Boston:—"International School of Peace," and "League for Permanent Peace."

With no evidence and no knowledge of the executor that a society exists such as is named in the bequest the same should fail.

But there is another ground, why, in the opinion of the court this bequest can not be legally upheld.

The purpose, the testatrix says, is "for *special* work in Ohio." What this "special work" is the testatrix does not tell us, nor can the court know, from the will itself, when or how or in what manner the trust must be executed, nor could the court correct any abuses in the execution of this trust.

For the foregoing reasons said bequest is held to be null and void.

As to bequest (14):

"To the Soc. for the Prevention of Cruelty to Animals Headquarters at Boston (the National Soc.) one thousand dollars for work in Ohio."

The purpose of this charity is, in the language of the testatrix, "for work in Ohio."

It will be noted that the word "special" (which occurs in bequest (13) is omitted, and the phrase runs, "for work in Ohio" general.

While generally speaking, in and of itself, this may appear indefinite, still we may assume that the American Humane Education Society associated with the Massachusetts "Society for the Prevention of Cruelty to Animals," which has headquarters in Boston and is a National Society doing work in many of the states of the Union, including Ohio, as shown by extrinsic evi-

dence, is the beneficiary referred to, and as it has a definite purpose and a definite plan of work, recognized by federal law, or if not by federal law, then by laws of the different states of the Union; that we have an Ohio society for the prevention of cruelty to animals, whose purpose, its mode of operation, the plan, the scheme of which is all worked out and fixed by the Legislature of this state, so that whatever apparent indefiniteness may appear in the statement of the purpose of this trust by the testatrix in her will is relieved by the definite statement of the law.

For such reason such bequest is held to be a valid bequest and the executor is directed to make payment thereof to the American Humane Education Society, the associated body of the Massachusetts Society for the Prevention of Cruelty to Animals, headquarters at Boston, Mass. for work in Ohio.

As to bequest (15):

“To the National Anti-Divorce League—one thousand dollars—to be used especially for promoting a universal divorce law for the U. S.”

It was stated by counsel that, with the sources of information at their command, they were unable to identify or locate such a league as the bequest names.

Counsel suggests: “Granting that there is in existence such a league as named, yet from its very title it would indicate that the main purpose of its existence is to combat the existing state and condition of laws of our various states pertaining to divorce, which would be illegal.

The court can not agree or see merit in this suggestion. The name would not necessarily indicate the object or purpose or rather the means and methods of accomplishment. Such might be perfectly lawful; and the promotion of a universal divorce law, if possible, such as the efforts to have adopted a uniform negotiable instrument act, might be advantageous and commendable and might include some charitable results.

Attention is directed, in argument and brief, to the action and findings of the National Congress on Uniform Divorce Laws, which met in session at Washington, D. C., in February, 1906, as entitled to weight and consideration in this connection.

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This Congress was composed of individuals conspicuous in civic life including members of the judiciary of the highest courts in the various states. This Congress arrived at the conclusion, after diligent study, research, and debate, that if a uniform divorce law *could* be adopted, it *should* contain at least *six* grounds for the severance of the marital ties: Bigamy, adultery, imprisonment for crime, extreme cruelty, wilful desertion, and habitual drunkenness.

Such Congress stated:—"It is with respect to the legal grounds of divorce that theological conservatism and social liberalism are in sharpest antagonism. From the scientific point of view divorce in itself is not immoral; on the contrary it is quite probable that drastic legislation is sometimes immoral, *

* * The most enlightened judgment of the age heartily approves of the policy of extending the legal causes so as to include offenses other than the one "scriptural" ground."

Yet a few of the states recognize this scriptural ground as the only basis for absolute divorce, and an examination of the statutory laws on divorce of all the states show a wide divergence of opinion as to various grounds. Such difference as would to the mind of the court cause a majority of lawyers of the United States to doubt the possibility of adoption by all of the states of uniform grounds.

The "National Congress" declared that, "No federal divorce law is feasible."

The court is of the opinion that it is not within the power of the federal government under the Constitution, to adopt or enforce "a universal divorce law," nor would Congress attempt it, and believing that the purpose of this bequest is impossible of performance the same is held null and void.

As to bequest (16) :-

"To the Home Missionary Soc.—The Foreign Missionary Soc (Am. Board) The Church & Parsonage Building Soc—S. S. & Pub—Soc— College & Ed. Soc. Am. Miss. Soc.—especially for the Indians—Colored people & Chinese.

All National Socs. of the Congregational Church five hundred dollars each.

These bequests to the Nat. Socs. of the Congregational Church

I wish paid through the Woman's Miss. Soc. of the First Congregational Church, Mansfield, O."

It appears that there are six societies named specifically in this bequest.

Extrinsic evidence indicates that these, so referred to by testatrix, using their proper names in the order referred to in the bequest are:

(1) "The Congregational Home Missionary Society."

(2) "The American Board of Commissioners for Foreign Missions."

(3) "The Congregational Church Building Society."

(4) "The Congregational Sunday School Extension Society."

(5) "Congregational Educational Society."

(6) "American Missionary Association."

And these are all denominated "National Societies."

It was stated by the pastor of one of the Congregational churches of Mansfield that there are in all, eight "National Societies" of the Congregational Church, two—the Congregational Board of Ministerial Relief, and the Pilgrim Memorial Fund—which are not specifically named in this bequest; but it is the church's contention that these last two were meant to be, and were in fact, included by testatrix in her benefaction, and that such intention is borne out by the latter part of such bequest, by the words she used therein, "*All* National Socs. of the Congregational Church five hundred dollars each. These bequests to *the* Nat. Socs of the Congregational Church I wish paid through, etc."

(The italicizing of "All" and "the" is by the court to direct special attention, upon which words special stress is made by such pastor to support the church's contention.)

Counsel for plaintiffs deny that such was the purpose and intention of testatrix or that the wording referred to supports such contention.

The executor and counsel for defendants is neutral on this proposition.

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In the opinion of the court the words last quoted are only descriptive of the church connection of the "societies" previously named and were not intended to enlarge the number of societies to which he was making bequests, nor to include the last two named as omitted societies and it is the holding of the court that such last two named societies—the Congregational Board of Ministerial Relief and the Pilgrim Memorial Fund—were not meant to and do not participate as legatees under such bequest.

As to bequest (17) and (18): the latter relating to the subject of the former, they must be considered together—the residuary bequest and attempted trust for "Religious & Philanthropic work" etc. and the private "relative" provision attached thereto as a superior charge.

These paragraphs and attempted bequests present the most difficult questions for solution; the court has given them many hours of thought and study and has carefully examined the holdings of numerous courts on somewhat similar questions, and has been compelled to arrive at conclusions contrary to its desire to uphold these attempted bequests and trust if possible.

Taking these up in parts as questions present and rules of disposition and construction apply, attention is first directed to the fact that, while the residum, consisting of both real and personal property, is bequeathed to the First Congregational Church and the Mayflower Memorial Congregational Church and "the income is to be used for religious and philanthropic work in Mansfield, Ohio—especially among children and young people," testatrix says in the latter part of paragraph (17) "*I do not wish any of this money (income) appropriated to any church;*" and, while the title to the property is vested in such churches *they are to have no direct dominion or supervision thereof and they receive no benefit therefrom;* they are mere holders of title of—the corpus of the trust with no authority for management, upkeep, repair or disposition.

In the latter part of paragraph (16) testatrix says:—"my W Park Ave Real Estate (and all she had is on this street) I wish left intact;" and in the latter part of paragraph (17) she says:—"I wish the property belonging to my estate to be kept in good order."

Passing now to the purposes of this attempted trust:

“The income to be used for religious & Philanthropic work in Mansfield Ohio—especially among children & young people promoting among them Christian living the Fruit of the Spirit as shown in Galatians Chapter 5—Verse 22—(and here should be *read in* such Scripture verse, which is as follows:—But the fruit of the Spirit is love, joy, peace, longsuffering, gentleness, goodness, faith;’)—total abstinence from strong drink & tobacco in all forms—rules of health, thrift & economy.”

In what way the “income” shall be used or applied to accomplish these purposes the testatrix does not state.

She does not give the churches named, as naked trustees, authority to direct or to use and apply as other funds expended by them for the accomplishment of these very purposes in their plan of work.

Had she given to the churches for their use for the purposes indicated, or vested them with discretion and not attempted to attach a “relative” bequest which would or might destroy such charitable purpose, a court might uphold such bequest, for the churches have a definite plan of work seeking the accomplishment of such purposes.

Although testatrix states that the income is to be used for religious and philanthropic work, she goes further and directs or *attempts to direct* in what manner this is to be accomplished.

If the purpose is to be carried out, it must be carried out in the manner directed, and not otherwise. In other words testatrix attempts to define what shall constitute “religious and philanthropic work,” and we must confine the purpose of the trust to the things enumerated, that is her will, and we can not substitute or deviate.

There is a question whether there would exist a fund to disburse, after the upkeep and possible “relative” charity attached is deducted, to that I will refer later. But, for the purpose of this question, and for argument, granting that there would exist a fund to disburse, and that the proper proportions to the beneficiaries could be ascertained, in what manner is the “income”

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to be distributed by the ultimate trustees—the “administration board?”

Nowhere in the residuary clause are such trustees given any discretion; any liberty of action, any power to rely upon their own judgment, except to determine in the “relative” bequest whether or not such relatives are objects of charity in which event such administration board is to make them monetary payments of \$200 per year from such “income.”

Such trustees are not a body having a fixed work and plan, they are not given authority to devise ways and means for carrying out testatrix’s instructions. Yet, they must expend the fund so as to accomplish or aid in bringing about at least four things:— (1) “Promoting among them Christian living—the fruit of the spirit as shown, etc.,” (2) “Total abstinence from strong drink & tobacco in all forms,” (3) “rules of health,” (4) “thrift and economy.”

The last three are physical virtues. The first is purely spiritual. Both are attributes of mind—perceptible, conceivable, yet intangible—nothing concrete—nothing specific—nothing definite.

As suggested by counsel: “If ‘work’ (religious & philanthropic *work*) means *propaganda*, then propaganda to effect or bring about the last three purposes is probably conceivable and possibly subject to human execution. We can conceive a propaganda to be devised and executed among the people of Mansfield by *teaching*, by *lecturing*, by *publication* and *distribution* among the people of Mansfield effecting “total abstinence,” “rules of health,” “thrift & economy.”

But who will attempt to devise and create the limits and boundaries of Christian living producing the “fruit of the “spirit?”

This has not yet been determined for final accomplishment in the nineteen hundred years since Christ walked upon the earth.

Who will attempt to give us the “specifications?”

As was suggested—a will is not for *contemplation*, it is for *execution*.

A will is the plan for the builder, the worker, and what builder, what worker, will undertake to execute this purpose without “specifications.”

What builder, what worker, what propagandist will undertake to devise and execute a method or means, fixing its limits and boundaries of expending funds to promote or effect in the people of Mansfield, "love," "joy," "peace," "long-suffering," "gentleness," "goodness," "faith," as conceived by Paul.

Paul himself did not attempt it. It demands too much for human ingenuity. Its limits can only be measured by Eternity.

It carries us beyond the earth into spiritual things, purely spiritual, and not subject to human definition, human limitations, human boundaries, human specifications. These specifications, these limitations, these boundaries, these methods and means are not in the Epistle of Paul, and it is evident they are not in the will of Susan M. Sturges.

How can a court execute? How can trustees execute such a purpose without specifications? How can a court be guided in the execution of such a trust? How can trustees be restrained? How can a court *correct* any abuses?

If some of such purposes were deemed workable, then how is a court to apportion the fund between these purposes: How much to one purpose and how much to the other purpose? When to one purpose and when to the other purpose? Or, how long to one purpose and when never to the other purpose?

Again, if the intent of the testatrix is to control, is to govern, then some single way, then some method, must be devised or created whereby *all* of these purposes at one and the same time may be effected, among the people of Mansfield, "especially among children and young people."

As the court views it, it can not be done, it is beyond human power. The testatrix did not do it herself in the provisions of her will, and she can not throw it upon the court. The law imposes no such duty upon the court.

The purposes of this bequest being so vague, indefinite and uncertain that, to the mind of the court, they can not be carried out under any directions given by the testatrix, and being impossible of direction and enforcement by a court, the same is for such reasons void.

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And there are other reasons why, to the mind of the court, this bequest must be held void.

1st.—*The object of the Trust.*

Testatrix uses the words: "children & young people" to designate the *cestui que trust* under her will.

It will be noted that she uses other words which indicate that they are not the only persons who are to receive the benefit of her legacy. The word "especially" is used in referring to the "children & young people." So that, it would appear beyond question that another, part, class, or division of beneficiaries were to be included within her bounty. This other set must necessarily refer to either middle-aged people or elderly people, or both; but as to what portion they are to receive is beyond comprehension.

It is not possible for the trustees, or the "board" attempted to be created, to determine what division to make, and here again we recall that the testatrix has not vested discretion in such trustees or such board. (See 5 N. P., 149.)

Evidently the "children & young people" are not to receive all of the proposed benefits; if not, what part? There is an indefinite limitation, so indefinite in fact that it is incapable of construction.

We must distinguish between uncertainty of *individuals* to be benefited and the *class* to be benefited; in the former uncertainty is an element in charitable trusts, in the latter certainty is required. (See 11 C. J., 341, Case Note 72.)

"The general rule may be stated that the gift will be held invalid as a charitable trust unless the beneficiaries are sufficiently designated so that the court may carry the purposes of the testator into effect." 2 Alexander on Wills, 1655, Note 35 and cases cited.

For the foregoing reason this attempted trust would fail for uncertainty.

2nd.—*The subject of the trust.*

It is a self-evident proposition that in any form of a trust, charitable or otherwise, if the subject-matter of the trust fail

or be diminished to a point of little or no value, the trust must fail for want of subject.

It was contended that such is the situation in this case so far as this proposed trust property is concerned.

Extrinsic evidence was offered as to the condition of the real estate in question, buildings old, not modern in appointments, and out of repair, and the court is personally familiar with such real estate and conditions and has been from boyhood and knows the evidence as to such condition is true.

It was also shown that the income, in the nature of rentals, from the premises named in the will, would under the most favorable circumstances be almost, if not entirely, consumed in the expense of administration, taxes, repair and upkeep, and that there would be no fund, or very little, to distribute for any purpose attempted to be named in the will.

If this be true then the power is lacking to put the trust in operation.

It is stated in 11 C. J., 351:

“Where it is *uncertain* whether there will be *anything* in the hands of the trustees to devote to the charitable purpose, the trust for such purpose is invalid.”

When we further consider that “the income” mentioned in paragraph (17) is subject to a possible reduction by an occupancy of a part or all of the real estate from which the income is to be derived, and an additional possible deduction of from \$200 to \$600 by cash payment to certain relatives of testatrix, which is made a superior charge upon such income, and from extrinsic evidence it is apparent that there is at least one such relative qualified and ready to call for the fulfillment of this provision, it would appear to the court that there would be an entire absence of net income—or perhaps a deficit—for the “board” to administer for same, and perhaps many years to come.

In *Vilce v. Van Anden*, 248 Ill., 358, 362, is the following:

“A will provided that, after the death of testator’s widow and

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daughter to whom annuities were given for life, the trustees 'may give such part or portion' of the remaining estate 'as they may think best and proper to any one or more of my brothers or sisters that may stand in need of the same, in the judgment of my said trustees, and the remainder thereof shall be devoted by said trustees, *in their discretion*, to the advancement of the cause of temperance or in aid of one or more manual training schools' in a certain city. *Held*—the bequest is void for uncertainty, in that it was uncertain that there would be any part of the fund remaining at the death of the annuitants."

For the foregoing reasons, in the mind of the court this attempted trust would fail for uncertainty as to subject.

3rd.—*Effect of paragraph (18)*—effort to engraft a private trust or charity upon the attempted public trust of paragraph (17)—

Without requoting this paragraph, which was set forth *in toto* previously, it is clearly apparent that testatrix intended to make these provisions a charge upon the bequest in paragraph (17) and to make the private objects to her bounty dependent upon accommodations and funds to be derived out of the subject-matter of her attempted public charity.

There is a very interesting and instructive case bearing upon this subject and charitable trust in general—*Kelly v. Nichols*, 19, L. R. 2A, 413, but to save further extension of this memorandum reference is made without comment.

The general rule as presented in 11 C. J., 330 is—

"Where charitable purposes are mingled with other purposes, or where the terms used are so broad that they include both charitable and noncharitable purposes, the whole gift fails as a charity for uncertainty."

And for the reasons above noted the court is of the opinion that this attempt of testatrix, and her association of disposition—thus engrafting of a bequest for "relatives" which would destroy or consume all or a large part of the "income," is destructive of the former attempted charitable trust and another reason why the entire, attempted, bequest should be held void.

4th:—*Impracticability of attempted method of administration of proposed trust.*

In addition to the reasons already given which render invalid such bequest, we come now to the *manner* or *method* in which testatrix has attempted to direct the carrying out of her wishes in regard to said trust fund, and the court is of the opinion that the administration of this proposed trust and the expenditure of the income, if there was any to expend and the trust was otherwise legal, is impossible to carry out because the vehicle or vehicles attempted to be constructed for such purpose are impracticable, unworkable and therefore void.

In the first instance, the property or fund is bequeathed to the *two* churches as it were; however they are not to administer it through their regularly constituted boards of trustees or other officials; so that, in reality the *churches, as such*, have absolutely no control over the property or income thereof; the naming of them as "residuary legatee" has no meaning, and can only be considered as surplusage.

It is *not* the *two churches* that testatrix wishes to carry out her plans; it is in her language—"these two church pastors." The properly constituted authorities of the churches are not named and not even suggested. The court can not see how the conduct of the pastors is in anywise to be controlled or regulated by any other power than their own wishes, whims, and desires. The court could not control nor direct them. They are not the trustees of the property or the fund. Whatever view we may take of the matter the churches, *as such*, are not to control the trust or distribute the fund, nor are the pastors to do so.

Then testatrix proceeds to create what is termed a "large board, composed of "these two church pastors" *with* "two women & two men from each church." Likewise, this "board" is not to administer the trust or disburse the income.

Here we may inquire *how* this "larger" board is to be selected? Testatrix provides that they are "to be elected yearly by the several churches."

Who is to elect them? The "several churches."

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Does this mean *by* the regularly constituted officials in said churches or by the *full* membership thereof, specially called together for that purpose?

What percentage or proportion of the congregation can elect?

What proportion or number shall constitute a quorum for this purpose?

The will does not specify. The court does not know, it can not say; the best it could do would be only to guess, to add to testatrix's provisions, to interpolate and supply what is fatally lacking.

This, under the established rules, the court will not and can not do.

If testatrix had created *a trustee with discretion*, a different situation would be presented; but she has attempted to lay the course and to point the way; we must follow it, *if possible*, if *not possible* then we can not substitute a way of our own, a new *modus operandi*.

But the above named "board" is not to act alone; it is to act "in connection with the pastor and a man and a woman (to be elected yearly by each church) from each of the Evangelical churches of Mansfield."

Whether it is meant that this additional group is to be elected by the Congregational churches *or* by their *own* churches is uncertain and difficult to determine.

This would require construction and from the language of the bequest if construed could only be by guess.

However, supposing that it is possible to bring into existence this "larger" board. It is only brought *into existence* for the purpose of *giving birth* to another board; it is not the "larger" board that is to administer the trust, it is the child, the offspring, to whom is attempted to be given the income for disbursement.

Now, the "larger" board is to be created from what source? From "each of the Evangelical churches of Mansfield." In view of this command or direction it is necessary that the court, or some *authority* point out specifically *what are* and *what are not* "Evangelical churches."

Although extrinsic evidence was presented on this question,

and as to the definition of Evangelical, and what churches of Mansfield are or are not "Evangelical," from the position the court takes generally as to this bequest it is unnecessary for it to adopt a definition or determine what are or are not Evangelical churches.

Suffice to say that no two of the four ministers who testified agreed exactly on these questions.

If these men whose life study and work has always been in lines which should enable them to agree upon these questions, could not do so, and fail to designate and classify how could it be expected that a court should decide unless arbitrarily.

If the court should adopt the number of churches practically agreed upon as Evangelical, by two of these ministers, as the only Evangelical churches, we would arrive at an approximate number of persons who would constitute this larger board—we would have something over one hundred persons, an unwieldy bulky, and heterogenous body, with diverse views and opinions, conflicting ideas and theories as to the proper channels for the use of the *income* granting that any should exist.

And we must remember that it is only those who are "total abstainers from strong drink & tobacco" who are to be "on this administration board—or members of the larger or smaller board *in any capacity*." We have no means of ascertaining except by personal interview of all the "Evangelical church" people of Mansfield, as to their inclinations in the above regard, but we may believe that a fair preponderance are guilty of the latter infraction—the use of tobacco in some form; so it devolves upon the members themselves to remain off the various boards or to be cross-examined by someone as to their propensities to the things prohibited.

These suggestions might appear trifling and yet are they not of the very essence of testator's commands and directions?

Can we lightly cast them aside as unworthy of consideration, when she has not only in this paragraph, but throughout her will, indicated her aversion to tobacco, even going so far in paragraph (12) as to attempt to "prevent advertisements of tobacco & its cultivation especially in Ohio."

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So, therefore, if we are to give full effect to the directions, we are left in a sea of doubt as to the personnel of the various boards; and who is to remove the doubt? Who is to personally investigate and to determine this personnel?

And further, there is *no way* to enforce or compel the carrying out of testatrix's mandate as to the election of these bodies; the churches or congregations might or might not comply; it is purely a matter of option; if they failed to comply or act it would not be a case of *failure* of trustee, but one of *failure to pursue the course* laid out by the maker of the will, and of the only course permissible.

The method of selection with its restrictions as set forth by testatrix *must* be followed out in order to bring into existence this creature.

And if we should assume that it is legally and physically possible to accomplish what has been heretofore indicated we may now proceed to the last and final board in which is to reside the authority "to administer the income from this trust."

Testatrix directs that this "larger" board is "to elect five or seven from its membership composed of men and women equally."

Here is presented a mathematical impossibility; impossible to be performed, incapable of execution; the same difficulty as heretofore must present itself in their selection and control:—How are they to be elected? By what number or *proportion* of the "larger" board? What quorum? How long are they to serve? What discretion have they? What guidance can the court give?

Both counsel and the court have been unable to discover any criterion in the many cases involving charities, or to find one that resembles this case in this regard.

The only effect of the whole attempted trust provision is to hold in abeyance the property left by testatrix; dead property in so far as the heirs at law are concerned; valueless in so far as the income left for charitable purposes is to be considered.

In other words, by this provision, if possible of accomplishment, we have an organization, a vast machinery—of a wheel within a wheel, and again a wheel within a wheel, unrelated, unconnected by any law or any permanent rule of organization—a complex—

a huge complex machinery set in motion to *rent* real estate—two or possibly three houses, to *pay* the taxes, to *pay* the insurance, to pay custodian or care-taker hire, to keep up perpetually the repairs of buildings that are now old and in constant need of repair, in the most expensive (or valuable real estate) portion of the city—and all for the modicum of profit, if any, to be distributed for a purpose vague and indefinite, and so uncertain that no court can correct any of the abuses which might arise therefrom.

In the above reference I have quoted freely from the brief of counsel for plaintiff as it contains, in my judgment, such pertinent and coherent reasoning as to be unanswerable.

The conclusions arrived at, generally as to this bequest, seem to the court to be consistent with and fully sustained by 1 O. S., 161; 24 O. S., 525; 39 O. S., 29; and 9 O. C. C. (N.S.), 353.

Evidence was offered, which is undisputable, that testatrix became the owner of a piece of real estate on Park avenue, West Mansfield, O., after the execution of her will, and the question was presented whether it passed under the residuary clause or to the heirs.

In view of the holding that this residuary clause, and with it bequest (18) are void, and therefore all of the real estate of testatrix was undisposed of by her will and would pass to her heirs under the laws of descent of Ohio, it is unnecessary to pass upon this question, but it is the court's opinion, that if bequests (17) and (18) were valid, the language of paragraph (17) is sufficiently broad, under 16 O. C. C., 219 and 6 O. A. R., 275, to include such real estate and that it would pass to the residuary legatees as a part of the proposed trust property.

No question is made as to the remaining paragraphs, or bequests, and they are sufficiently clear that no interpretation or construction is necessary.

It might be suggested that paragraph (21) would not operate against rights of Charles M. Sturges and Mary D. Sturges as heirs.

Also that all undisposed of personal and real estate of decedent will pass to the heirs of Susan M. Sturges under the laws of descent.

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That paragraph (23) vesting construction of will in her former attorney is null and void.

Decree may be prepared construing the will and making findings in accordance with the foregoing opinion and the executor directed to distribute accordingly. Costs to be taxed against the estate of Susan M. Sturges. Exceptions may be noted. If any interested parties desire to appeal the amount of appeal bond is fixed at \$500.

INSURANCE PAYMENTS IMPRESSED WITH A TRUST.

Common Pleas Court of Clark County.

EUNICE WALCOTT V. EDWARD F. WALCOTT, SR.

Decided, May 24, 1920.

Government Insurance—Soldier Makes his Father Beneficiary—With Request that Part of the Proceeds be Paid to a Third Person to Which the Father Agreed—Trust Created Thereby.

Where one enlisted in the service of the United States takes out a policy of insurance for \$10,000, upon which a monthly payment is due from the government, upon the death of the soldier, and the father is named as beneficiary, but after the taking out of such insurance in the name of the father, the soldier informs the father that a certain sum is to be paid to a third person, and the father agrees it shall be so paid, upon the death of the soldier the sum paid under the policy to the father is impressed with a trust in favor of such third person.

GEIGER, J.

Heard on demurrer.

The plaintiff is the aged mother of Edward F. Walcott, who was the father of Edward F. Walcott, Jr. Edward F. Walcott, Jr., enlisted in the United States Army and made application for war risk insurance in the sum of \$10,000, designating his father, the defendant, as beneficiary.

Edward F. Walcott, Jr., died while in military service, and the war risk department has paid to the defendant the sum of \$57.50 per month since May, 1919, and under the application of the insurance policy will continue to pay said sum for the period of twenty years.

It is alleged in the petition that at the time of the issuance of said \$10,000 policy, Walcott, Jr., in a letter written to his father, directed him in the event of his death, to pay the plaintiff, his grandmother, the sum of \$20 each month out of the money received from the government.

It is further alleged that the defendant received said letter, and agreed that the direction of the letter would be complied with.

The petition alleges that the defendant paid over to the plaintiff \$40 out of the first two allotments, but refuses to pay her any further share out of the allotments.

The petition alleges that the defendant is not the sole beneficiary under the policy of insurance, but holds \$20 each month for 240 months, in trust only, as the agent or trustee of the plaintiff.

The petition asks that the court declare the defendant an agent only for \$20 of each allotment, and that it be decreed that from all the allotments collected by the defendant prior to the time of the hearing, defendant pay over to the plaintiff \$20, and that he pay \$20 from all future payments, and that the defendant be required to give bond.

To this petition defendant demurrs on the ground that the facts plead do not constitute a cause of action.

It is very unfortunate that controversy should have arisen between an aged mother and her son, in reference to the apportionment of the amount received from the government on account of war insurance taken out by her grandson, who lost his life in the service of the country. The court regrets that the mother and son should call upon the court to settle a controversy over the disposition of money derived from the government on account of the death of the grandson of one, and the son of the other.

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Walcott v. Walcott.

Counsel for defendant insists that the letter plead in the petition is simply a request to the father to give to the grandmother a certain portion of the sum each month; that the grandson was under no moral or legal obligation to provide for the grandmother, and that in as much as the petition does not state that either at the time or before the issuance of the policy, the defendant agreed that in consideration thereof he would pay to the grandmother the sum of \$20 per month, there is no binding contract.

It is further insisted that there is no consideration for the contract, and that the policy must speak for itself, and as it on its face is a contract between the government and the deceased soldier, to pay to the named beneficiary the amount of the insurance, nothing can be considered which will vary the terms of that contract.

The court is unable to take the view of counsel for defendant in this matter. It is clear, that if the son after having taken out insurance in the name of his father, directed that the father, in case of his death, pay \$20 a month to the grandmother, and the father agreed to do so, that a trust is imposed, and that equity may interfere to prevent the father from converting the property to his own use, and may declare a trustee *ex maleficio*.

There need have been no contractual relation between the father and the son, that the father would agree to turn over a portion of the insurance, provided the son would take out a policy in his favor. It is sufficient if it were understood by the father at the time the policy was taken, or afterwards, that he was not to have the full benefit of the insurance policy, but that a portion of it was to go to another person, and if the father either agreed to such disposition or remained silent, the trust is impressed upon the money, and can be enforced in equity.

There is no attempt to vary the terms of a written contract between the government and the parties to the insurance policy, but it is within the power of a court of equity to compel proper distribution of the fund after it has been received by Walcott, the father.

The court needs but call the attention of counsel for defendant to the case of *Winder et al, Extrs., v. Scholey et al, Trustees*, 83 O. S., 204. While it is true that in this case the property was disposed of by a will, and not by a contract of insurance, yet the principles stated and the cases cited are, in the opinion of the court controlling.

The court is also impressed with the reasoning in the unreported case of *Makenson, Guard.. v. Arbogast*, Logan county court of common pleas, decided October 13, 1919. Of course this case is not disposed of merely on demurrer, and it remains to be seen whether the facts justify the statements made in the petition.

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